No. S029551

SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOE EDWARD JOHNSON, Defendant and Appellant.	(Sacramento County Sup. No. 58961)

APPELLANT'S REPLY BRIEF

Appeal from the Judgement of the Superior Court of the State of California
for the County of Sacramento

HONORABLE PETER MERING, JUDGE

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOE EDWARD JOHNSON, Defendant and Appellant.	No. S029551 Sacramento County Superior Court No. 58961

APPELLANT'S REPLY BRIEF

INTRODUCTION

In this brief, appellant addresses specific contentions made by respondent, but does not reply to arguments which are adequately addressed in appellant's opening brief. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief ("AOB"). Statutory references are to the Penal Code unless otherwise noted.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO REPRESENT HIMSELF

Appellant contends that the trial court erred by denying as untimely his *Faretta*[1] motion, which was filed a full 50 days before his jury was empaneled. (AOB 33-63.) Respondent claims the motion was made "on the eve of trial" (RB 47) and was therefore untimely. (RB 38-52.) Respondent also argues at length, based on the assumption that the motion was untimely, that the court did not abuse its discretion under *People v. Windham* (1977) 19 Cal.3d 121 (*Windham*) by denying the purportedly untimely motion. Appellant's argument, however, is only that the motion was timely. He has not sought relief from the exercise of the trial court's discretion denying his *Faretta* motion under *Windham*, and respondent's arguments that the trial court did not abuse its discretion by doing so are therefore irrelevant here.

A. Appellant's *Faretta* Motion Was Timely

On November 15, 1991, the date for appellant's retrial was continued until June 22, 1992. (30 RT 10092.) Appellant's motion for self-representation was filed June 8, 1992. (4 CT 1123.) Fourteen days later, on June 22, the parties appeared before the master calendar judge, who assigned the case to Judge Peter Mering and trailed the matter until July 6th. (4 CT 1138.) The master calendar judge did not hear or rule on appellant's *Faretta* motion. (30 RT 10108-10109.)

Judge Mering did not rule on appellant's motion until July 21, 1992, at which time he denied the motion. (32 RT 10955-10957.) On July 23,

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[1] *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

appellant submitted 52 pages of additional documentation in support of his *Faretta* motion. (6 CT 1149.1-1149.52.) On July 28, the court said it had read and considered the additional materials, but indicated it was not changing its decision. (34 RT 11341-11342.) Jury selection also began on July 28, 1992. (6 CT 1152.)

1. Appellant's Motion Was Not Filed on the Eve of Trial

Appellant contends that the motion was timely whether considered under this Court's "totality of the circumstances" test as set for in *People v. Lynch* (2010) 50 Cal.4th 693, 725 (*Lynch*) or the "bright line" test used in many of the federal courts and under which a *Faretta* motion is timely if filed before the beginning of meaningful trial proceedings, which is defined as the time when the jury is empaneled. (See, e.g., *Avila v. Rose* (9th Cir. 2002) 298 F.3d 750, 752; *United States v. Lawrence* (4th Cir. 605 F.2d 1321, 1325; see also AOB 50.) Respondent's argument, on the other hand, relies almost entirely on characterizing appellant's *Faretta* motion as being filed on the "eve of trial." (RB 47.) *Faretta* motions filed mid-trial are generally considered untimely. This Court has held that requiring that the motion for self-representation be made pretrial is "a workable and appropriate predicate" to exercising *Faretta* rights. (*Windham*, *supra*, 19 Cal.3d at pp. 127-128.) Additionally, in order to invoke an unconditional right to represent himself, this Court has held that a defendant must assert the right within a reasonable time prior to the commencement of trial (*People v. Burton* (1989) 48 Cal.3d 843, 852) and the eve of trial is not ordinarily a reasonable period of time before trial (*ibid.*; see *People v. Frierson* (1991) 53 Cal. 3d 730, 742). By attempting to characterize appellant's invocation of his *Faretta* rights as being on the eve of trial,

respondent apparently seeks to bring the case within the abuse of discretion standard of review for rulings on *Faretta* issues considered under *Windham*.

Appellant's motion, however, was not filed on the eve of trial. As an initial matter, respondent's argument is based on an erroneous view of when certain events occurred. Respondent erroneously claims that the scheduled trial date was June 20, 1992, rather than June 22 (RB 48), and claims variously that only eight or 12 days passed between the filing of appellant's motion and the scheduled trial date (RB 38 [12 days], 47 [12 days], 48 [12 & 8 days]). In fact, appellant's motion was filed June 8, 14 days before the June 22nd date. (4 CT 1123, 1138.)

More significantly, trial did not begin on either June 20 or June 22. While appellant contends that in assessing the timeliness of a *Faretta* motion, the time between filing the motion and empaneling the jury is the critical period (in this case, 50 days), under no circumstances can the beginning of trial in this case be dated earlier than July 6, 28 days after the motion was filed. Furthermore, none of the cases cited by respondent suggest that the "eve of trial" reaches more than a few days prior to the start of trial (see, e.g., *People v. Rudd* (1998) 63 Cal.App.4th 620, 625-626 [motion filed on Friday before Monday trial date]) and such cases more typically apply when defendant makes his motion the same day as trial (see, e.g., *People v. Valdez* (2004) 32 Cal.4th 73, 102-103 [moments before jury selection]). Under no reasonable interpretation of the facts can appellant's motion be seen as filed on the eve of trial, and the *Windham* test is therefore inapplicable.

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2. Appellant's Motion Was Timely under the Totality of the Circumstances

Analyzed under the totality of the circumstances test described in *Lynch*, *supra*, 50 Cal.4th at p. 725, appellant's motion was timely. In his opening brief, appellant argued how each of the factors described in *Lynch* as relevant to assessing the timeliness of a *Faretta* motion under the totality of the circumstances test demonstrated that appellant's motion was timely. To the extent respondent has answered these arguments, its answers are unavailing.

As a preliminary matter, the determination of whether appellant's motion was timely is subject to de novo review by the this Court. The appellate court is to review the entire record de novo to determine whether a defendant validly exercised his constitutional to represent himself. (*People v. Dent* (2003) 30 Cal.4th 213, 218; *People v. Koontz* (2002) 27 Cal.4th 1041, 1070; see *People v. Marshall* (1997) 15 Cal.4th 1, 24-25.)

The six factors specified in *Lynch* as relevant in an assessment of the totality of the circumstances relevant to whether the a Faretta motion is timely filed are as follows:

1. *The time between the motion and the trial date.* The trial court was clearly wrong in determining that the period between the filing of the motion and the trial date was two weeks. (32 RT 10955.) The *Faretta* motion was filed on June 8, 1992. On June 22, trial did not begin; the case was trailed until July 6, 1992, and a jury was not empaneled until July 28, 1992. At the time Judge Mering heard and ruled on appellant's motion, the June 22 date had long passed. When an appellate court determines whether a trial court erred by denying a *Faretta* motion as untimely, it must evaluate the decision based on the facts as they appear at the time of the hearing.

(*People v. Moore* (1988) 47 Cal.3d 63, 80; see also *People v. Marshall* (1997) 15 Cal.4th 1, 25, fn. 2.)

Respondent contends that the 50 days between the motion and the empaneling of the jury was similar to the 45-day period in *Lynch* where this Court found the motion to be untimely. But in *Lynch*, other factors weighed against granting the motion, including defendant's failure to offer a reasonable explanation as to why he had not filed earlier, and substantial evidence that defendant was manipulating the process. (*Lynch*, 50 Cal.4th at p. 726.)

2. *Whether trial counsel was ready to proceed.* Respondent states that appellant's attorney, Charles Ogulnik, was ready to proceed to trial (RB 49) but fails to note that Ogulnik made this assertion to the court on July 7, 1992 (49 RT 10587), 29 days after appellant's motion was filed. As discussed in more detail in appellant's opening brief, the defense clearly was not ready for trial as of June 8 as it was still conducting investigations and filing motions in June and early July. (AOB 55.)

3. *The number and availability of trial witnesses.* Appellant argued in his opening brief that any prejudice to the prosecutor that might be caused by the disruption of the trial schedule due to granting the *Faretta* motion was speculative and unlikely in light of the relatively few witnesses being called by the prosecution. (AOB 55-57.) Appellant argued that substantial portions of the prosecution case was being offered through the reading of prior testimony and documentary evidence, and that most of the prosecution witnesses were either police or expert witnesses. The prosecution made no showing that any of the witnesses would be inconvenienced. Respondent points to a statement by the court that additional delay *could* result in prejudice to the prosecution. (RB 49.) But

this statement by the court was not part of its ruling on the timeliness of appellant's motion, but rather went to its denial of the motion under *Windham* after having found the motion to be untimely. Respondent believes that this Court cannot, in reviewing the totality of the circumstances, "substitute its own judgment in place of the trial court's judgment" in assessing the applicability of this factor. (RB 49.) But as discussed above, in assessing timeliness of the motion, this Court is to consider the totality of the circumstances by de novo review, not deferential review. Furthermore, the court only stated that additional delay *could* result, not that it *would* result. The statement was of no significance in assessing the totality of the circumstances.

4. *Complexity of the case.* Appellant in his opening brief argued that this case is not as complex as a full capital trial because it is a penalty phase retrial, and that most of the prosecutor's penalty case involved presenting of the circumstances of the capital crime which had already been proven. (AOB 57.) Respondent incongruously claims appellant has argued that the case is not particularly complex "because the prosecution relied primarily on evidence of prior convictions." (RB 48.) Appellant claimed no such thing. Appellant pointed out that most of the prosecutor's case-in-chief was evidence establishing the circumstances of the capital crime, which had already been proven. (AOB 57.) Respondent claims also that appellant's need for a continuance was evidence of the complexity of the case. (RB 49.) But appellant told the court that it was premature to make an estimate of how much time he might need. (31 RT 10645.) Absent any indication of how long a continuance appellant would request, the mere fact of a request for continuance is weak, if any, evidence of the case's complexity.

5. *Any ongoing pretrial proceedings.* Appellant described the numerous motions still pending in the trial court, and noted that on July 9 the trial court commented that it did not have time to address appellant's *Faretta* motion because it was "a little overwhelmed" by the volume of pretrial motions to be heard. (AOB 57-58, quoting 31 RT 10626.) Indeed, at the time appellant filed his motion, a trial judge had not even been assigned. Respondent does not dispute that these numerous pretrial motions were pending, and appears to implicitly acknowledge that this factor favors finding appellant's *Faretta* motion timely.

6. *Whether appellant had earlier opportunities to make the motion.* In his opening brief appellant has described in detail appellant's attempts to work with his lawyers throughout 1991and 1992, and the process by which he came to discover that Ogulnik had a record of discipline with the State Bar for doing incompetent work on behalf of clients. Ogulnik had been permitted to return to practice only a few months before he was assigned to appellant's case. Appellant received information to that effect in early May, about a month prior to when he filed his motion.[2] (AOB 43-47, 58-60.) Respondent ignores this information and focuses instead on the trial court's discussion of other instances in which appellant filed a *Marsden* or *Faretta* motion. (RB 50.) Respondent again focuses on a reason for the court to exercise its discretion to deny an untimely *Faretta* motion under *Windham* rather than a reason for finding the motion untimely. Prior motions are not relevant to whether appellant had an earlier opportunity to make the present

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[2] Appellant had actually prepared his written motion for filing by June 1, 1992, when he wrote to Masuda from San Quentin asking to have the motion filed for him out of concern that it would take several weeks to get to the court if he mailed them to the court himself. (6 CT 1149.52.)

motion.

For each of the factors set forth in *Lynch*, *supra*, 50 Cal.4th 693, the totality of the circumstances supported finding appellant's motion timely. (See AOB 62-63.)

3. The Motion Was Timely under the Test Used in Federal Courts

Appellant has argued that this Court should apply the test used in federal courts to determine whether a *Faretta* motion is timely filed. Various federal court consider a *Faretta* motion timely when it is filed before trial. (See AOB 49-52, 61-63.) Respondent disagrees, but does offers no substantive argument. No further reply is therefore necessary.

4. There Were No Other Grounds on Which to Deny Appellant's Motion

Finally, respondent suggests an alternative ground on which to deny appellant's *Faretta* motion. Respondent speculates that if appellant had represented himself, he would have become disruptive. Respondent recognizes that the trial court did not consider this factor in ruling on appellant's motion. (RB 51.) In *People v. Butler* (2009) 47 Cal.4th 814. This Court rejected a claim that defendant's out-of-court misconduct might have justified the revocation of his *Faretta* rights because the trial court did not rely on that ground. Respondent's argument should similarly be rejected. Furthermore, the evidence respondent marshals to establish this point are minor incidents that all occurred *after* appellant's motion had been denied. The earliest incident respondent cites (RB 51; 32 RT 10975) is subsequent to the trial court's denial of appellant's motion (32 RT 10955). Respondent's reliance on *People v. Welch* (1999) 20 Cal.4th 701, 734, is misplaced. In *Welch* this Court denied appellant's timely *Faretta* motion based on disruptive behavior defendant had *already* displayed in court.

(*People v. Welch*, *supra*, 20 Cal.4th at pp. 734-735.) Respondent's point is without merit. Respondent also suggests that the trial court properly considered the competence and diligence of Ogulnik and Masuda in assessing the timeliness of appellant's motion. (RB 51.) This is incorrect. The quality of counsel's representation is, again, a factor under *Windham* that the trial court is to consider in deciding if an untimely *Faretta* motion should nevertheless be granted (*Windham*, *supra*, 19 Cal.3d at pp. 128-129) and that is the purpose for which the trial court was considering it here. (32 RT 10958.) The *Windham* factors are not relevant to determining if appellant's motion was timely.

B. The Error Requires Reversal

Respondent argues that appellant cannot show he was prejudiced by the error. (RB 52-53.) Respondent's prejudice analysis is completely irrelevant. A showing of prejudice is necessary when appellant is claiming relief from the wrongful denial of an untimely *Faretta* motion under *Windham*. But as noted above, appellant has not made a claim for relief under *Windham*; his argument is that the court denied a timely *Faretta* motion. Where the trial court erroneously denies a timely *Faretta* motion, harmless error analysis does not apply. The erroneous denial of a timely motion for self-representation is reversible per se. (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177, fn. 8; *Flanagan v. United States* (1984) 465 U.S. 259, 268; *People v. Butler* (2009) 47 Cal. 4th 814, 824; see also AOB 63, citing *People v. Doolin* (2009) 45 Cal.4th 390, 453; *People v. Joseph*, *supra*, 34 Cal.3d at pp. 946–948.) The sentence and judgment of death must therefore be reversed.

THE TRIAL COURT ERRED IN HOLDING THAT APPELLANT HAD NOT ESTABLISHED A PRIMA FACIE CASE OF DISCRIMINATION IN THE PROSECUTOR'S EXERCISE OF PEREMPTORY CHALLENGES ON THE BASIS OF RACE

During jury selection, the prosecutor used three of his first 15 peremptory challenges to strike three of the five African Americans who had been seated. Appellant has demonstrated that statistical analysis of the prosecutor's strikes, combined with other factors related to the process of jury selection, established a prima facie case of discrimination under *Batson v. Kentucky* (1986) 46 U.S. 79 (*Batson*). (AOB 64-89.)

A. The First-Stage Inquiry of *Batson* Focuses on Whether a Defendant Has Raised a Suspicion That a Strike Was Discriminatory

At the first step of the inquiry under *Batson*, *supra*, 46 U.S. at p. 96, a defendant must establish a prima facie case that the prosecutor discriminated against a protected class in exercising a peremptory challenge. All that appellant needed to show at this first step was evidence of an "inference that discrimination has occurred." (*Johnson v. California* (2005) 545 U.S. 162, 170.) Respondent argues that the trial court "correctly concluded" that the relevant facts did not give rise to an inference of discrimination. (RB 57, 60.) As appellant has argued, however, at the time of appellant's penalty retrial, this Court used the "strong likelihood" standard to resolve whether a defendant made the necessary showing at the initial stage. (AOB 79-80, citing *People v. Sanders* (1990) 51 Cal.3d 471, 500-501.) The United States Supreme Court later found that California had adopted a stricter standard than was permissible under *Batson*. (*Johnson v. California* (2005) 545 U.S. 162, 173.) Respondent does not explain how

the trial court's ruling could have been correct if it was based on an impermissibly high standard, as it was bound to have used in following established law set by this Court at the time of the motion. (See *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455 [lower courts must follow this Court's decisions].) explain how the trial court's ruling could have been correct if it was based on an impermissibly high standard, as it was bound to have used in following established law set by this Court at the time of the motion. (See Auto Equity Sales, Inc. v. Superior Court of Santa Clara County (1962) 57 Cal.2d 450, 455 [lower courts must follow this Court's decisions].)

This Court independently reviews the issue when the record does not show that the trial court used the appropriate standard in determining the first stage of a *Batson* claim. (AOB 81; *People v. Howard* (2008) 42 Cal.4th 1000, 1017.) At the first stage of the inquiry, the burden on a defendant is low. It is not to be "so onerous" that a defendant would have to persuade a trial court that discrimination had likely occurred. (*Johnson v. California, supra*, 545 U.S. at p. 170.) A prima facie case requires only circumstances raising a suspicion that discrimination occurred. (*United States v. Stephens* (7th Cir. 2005) 421 U.S. 503, 512.) It is particularly small because "proceeding to the second step of the *Batson* test puts only a slight burden on the government." (*United States v. Collins* (9th Cir. 2009) 551 F.3d 914, 920.) "A single inference of discrimination based on 'all [the] relevant circumstances' and the 'totality of relevant facts' is sufficient to move the *Batson* inquiry to step two."(*Ibid.*, quoting *Batson, supra*, 476 U.S. at 94, 96.)

Respondent effectively increases appellant's burden by arguing that a prima facie case is not established if the record suggests reasons for

excusing a juror other than race. (RB 59-60.) Appellant acknowledges that this Court has found that *Batson*'s first step is not met if there are "obvious race-neutral" grounds for striking a particular juror. (See, e.g, *People v. Taylor* (2010) 48 Cal.4th 574, 643.) This Court should reconsider this practice.

At the first stage of the *Batson* inquiry, the defendant need not persuade a court on the basis of all the facts that the challenge was the product of purposeful discrimination, but simply produces "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson v. California, supra*, 545 U.S. at p. 170.) Thus, the emphasis is on production rather than persuasion. (*Green v. LaMarque* (9th Cir. 2008) 532 F.3d 1028, 1029.) As the United States Supreme Court noted in comparing *Batson* to cases involving employment discrimination, "the burden-of-production determination necessarily *precedes* the credibility-assessment stage." (*Johnson v. California, supra*, 545 U.S. at p. 171, fn. 7, original italics.) "It is not until the third step that the persuasiveness of the justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." (*Purkett v. Elem* (1995) 514 U.S. 765, 768.)

Reviewing the record to determine if there may be race-neutral reasons to support a challenge reverses the *Batson* process by looking to reasons that might eventually defeat such a claim rather than focusing on whether the defendant has raised a suspicion that racial discrimination has infected the jury selection process. (*Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090.) Accordingly, to deny a *Batson* claim at the first step of the inquiry, there must be more than circumstances that "indicate the record

would support race-neutral reasons for the questioned challenges." (*Williams v. Runnels* (9th Cir. 2006) 432 F.3rd 1102, 1108.) A passable ground upon which a prosecutor could reasonably have based a challenge "does not suffice to defeat an inference of racial bias at the first step of the *Batson* framework." (*Johnson v. Finn* (9th Cir. 2011) 665 F.3d 1063, 1069; see *Paulino v. Castro, supra*, 371 F.3d at p. 1090 ["it does not matter that the prosecutor might have had good reasons to strike the prospective jurors. What matters is the *real* reason they were stricken" (italics in original)].)

The emphasis upon the "totality of the relevant facts" at the first stage of the inquiry therefore focuses upon evidence that "gives rise to an inference of discriminatory purpose." (*Batson, supra*, 476 U.S. 79, 94.) Indeed, both federal and state courts have detailed the type of evidence that may be advanced by the defendant in considering whether there is a prima facie case of discrimination. (*Id.* at pp. 96-97; see *People v. Wheeler* (1978) 22 Cal.3d 258, 280-281 [examples of the type of evidence that gives rise to a prima facie case of discrimination]; *Madison v. Commissioner, Alabama Dept. of Corrections* (11th Cir. 2012) 677 F.3d 1333, 1337 [listing circumstances relevant at the first-stage inquiry].) These factors clearly relate to the defendant's burden to raise a suspicion of discrimination rather than reasons that might later defeat such a motion.

The practice of the United States Supreme Court reflects the order of the *Batson* inquiry. In *Miller-El v. Cockrell* (2003) 537 U.S. 322, the state trial court determined that a prima facie case of discrimination had not been established. (*Id.* at p. 329.) The Court faulted the district court for relying on potential reasons for a challenge rather than to have given "full consideration to the substantial evidence petitioner put forth in support of the prima facie case." (*Id.* at p. 341.) In finding that the state court's first-

stage decision was "clear error," the Court did not scour the record to determine if there were race-neutral reasons that might have defeated the inference of discrimination. (*Id.* at p. 347.) Similarly, in *Johnson v. California*, *supra*, 545 U.S. at p. 173, the Court found that a prima facie case was established even though the trial court had been convinced that the prosecutor's strikes could be justified by race-neutral reasons. These decisions make clear that at the first stage of *Batson*, the proper focus is on whether a defendant has raised an inference of discrimination, rather than possible race-neutral reasons that might be found in the record.

Reviewing the record to look for a reason that suggests a race-neutral ground is the kind of judicial speculation of which the United States Supreme Court expressly disapproves. (See *Johnson v. California*, *supra*, 545 U.S. at p. 173 [criticizing the "imprecision of relying on judicial speculation to resolve plausible claims of discrimination"].) It places courts "in the almost untenable position of culling from the record possible race-neutral reasons for excusal." (*People v. Walker* (1998) 64 Cal.App.4th 1062, 1069; see also *People v. Buckley* (1997) 53 Cal.App.4th 658, 667 ["clearly uncomfortable for an appellate court to postulate hypothetical reasons a prosecutor might have challenged each juror"].) Indeed, it often may be possible to find a reason to support a challenge, but that does not mean that it has any actual relation to the prosecutor's subjective reasoning. Under these circumstances, failure to find a prima facie case because the prosecutor *might* have a reason to challenge a juror insulates the *Batson* inquiry from review. It is "all too easy to comb the record and find some legitimate reason the prosecution could have had for striking a minority juror[.]" (*People v. Harris* (2013) 57 Cal.4th 804, 872 (conc. opn. of Liu, J.) It also imposes a burden that would be virtually impossible for a

defendant to meet. A defendant who "shows statistical disparity based on the information then known to him, cannot be charged, prior to the prosecutor's explanation of his challenges, with developing a record that might refute the prosecutor's possible explanations." (*Williams v. Runnels*, *supra*, 432 F.3d at p. 1110.)

There are some courts that have considered in the first-stage analysis that there may be obvious reasons to strike a juror. However, even assuming that this is proper, the grounds for doing so have been very narrow. In *United States v. Stephens*, *supra*, 421 F.3d at p. 516, the Fifth Circuit cautioned that an "inquiry into apparent reasons is relevant only insofar as the strikes are so clearly attributable to that apparent, non-discriminatory reason that there is no longer any suspicion, or inference, of discrimination in those strikes." Under this standard, there must be more than a suggestion that there may have been a reason for the challenge.

In *People v. Wheeler*, *supra*, 22 Cal.3d at p. 287, this Court recognized that it "demeans the Constitution to declare a fundamental personal right under that charter and at the same time make it virtually impossible for an aggrieved citizen to exercise that right." It is no less important today to ensure that *Wheeler* and *Batson* remain an effective remedy in California. Indeed, there can be no doubt that "peremptory challenges often facilitate racially discriminatory jury selection." (*State v. Saintcalle* (2013) 178 Wash.2d 34, 49; see *People v. Harris*, *supra*, 57 Cal.4th at pp. 887-888 (conc. opn. of Liu, J.) [citing studies showing effect of race in jury selection].) Therefore this Court should ensure that constitutional claims of discriminatory juror selection are properly reviewed at each step of the *Batson* inquiry so that "actual answers" relating to the prosecutor's reasons for a challenge are brought forth. (*Johnson v.*

California, supra, 545 U.S. at p.172.) The present claim must be determined by examining whether appellant established a prima facie case of discrimination, rather than to look for reasons that the prosecutor might have used to justify his strike.

B. Appellant Established a Prima Facie Case of Discrimination

Appellant has argued that the prosecutor's use of peremptory challenges created a statistical disparity that was sufficient to raise an inference of discrimination. At the time of appellant's *Batson* motion, the trial court found that the prosecutor struck three out of five African-American prospective jurors.[3] (40 RT 13127.) The prosecutor had a 20 percent strike rate against African Americans and a 60 percent exclusion rate. These rates raised an inference of discrimination. (AOB 82-84.)

Respondent does not dispute these statistics, but argues that African Americans were amply represented in the final jury, composing 25% of the seated panel. Respondent does not address the many cases cited by appellant that found that statistical disparity established a prima facie case of discrimination even when other members of the group at issue remained

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[3] Respondent states that the prosecutor struck three out of six African American jurors. (RB 70.) Respondent apparently includes an additional African American who was selected after both sides accepted the jury, when one prospective juror informed the court that she did not want to decide the death penalty and jury selection was reopened. (40 RT 13133-13150.) A *Batson* claim, however, is decided with reference to the statistical record at the time the motion is made. (See, e.g., *Green v. Travis* (2d Cir. 2005) 414 F.3d 288, 299 [finding statistical disparity based record at the time the motion was made]; *People v. Welch* (1999) 20 Cal.4th 701, 746 [analyzing number of strikes at time of motion]; *People v. Harris, supra,* 57 Cal.4th at p. 870 (conc. opn. of Liu, J.) [noting jury composition at time of motion].)

on the jury panel. (AOB 84-85.) Respondent instead cites a third-step *Batson* case to argue that the presence of minority jurors on the final panel is an indication of the prosecutor's good faith in exercising challenges. (RB 61, citing *People v. Lewis* (2008) 43 Cal.4th 415, 480.)

The prosecutor's good faith may be important at the third stage of the inquiry, where his or her credibility must be determined. (*Snyder v. Louisiana* (2008) 552 U.S. 472, 477.) However, the presence of African Americans on the jury does not refute the statistical disparity that the prosecutor's initial use of his challenges created. (See *Williams v. Runnels, supra*, 432 F.3d at p. 1109 [that prosecutor did not strike an African American after defendant's *Wheeler* objection is not enough to refute the inference created by the statistical analysis at time of motion]; *Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1076 [prima facie case of discrimination although prosecutor did not strike remaining Hispanic juror after defendant's motion].)

Moreover, appellant does not rely on statistical disparity alone. Respondent ignores appellant's contention the prima facie case is strengthened because appellant is African American, the struck jurors are African American, and the victim is white. (AOB 85; see also *Madison v. Commissioner, supra*, 677 F.3d at p. 1337 [relevant circumstances include the subject matter of the case if it is racially or ethnically sensitive]; *United States v. De Gross* (9th Cir. 1990) 913 F.2d 1417, 1425-1426 [striking Hispanic prospective juror in a case with "racial and ethnic overtones" established prima facie case].)

Respondent states that the prosecutor did not engage in desultory questioning of the challenged prospective jurors (RB 68) but fails to consider that the prosecutor subjected one African-American prospective

juror, Kenneth Malloy, to further investigation apart from voir dire. (AOB 85.) Malloy was the only juror identified as having been investigated in this manner. The United States Supreme Court has explained that the manner of questioning African-American jurors is important in determining whether discrimination occurred. If the questions asked of African Americans are different in quality or tone from those asked of whites, it is more likely that racial considerations have infected the jury selection process. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 255, 257-260.) It is equally apparent that focusing an investigation on an African American raises a suspicion of discrimination and is relevant to whether there is a prima facie case of discrimination.

Respondent primarily relies on speculation that the prosecutor may have had a reason to strike the prospective jurors. (RB 66-68.) Respondent argues that the prosecutor could have been concerned that prospective juror Graham "responded equivocally" when she wrote that the courts "seemed to be fair" in cases she had heard about, but that it was difficult to judge unless you were part of the process. (15 CT 4281.) Rather than simply being equivocal, it appears that Graham wanted to judge specific situations according to the evidence, as her answers in voir dire on other matters indicated. (See 37 RT 12317 ["you have to access the facts" rather than opinion].) The prosecutor did not question Graham about her beliefs about the fairness of the system (37 RT 12316-12324), so there is no indication in the record that her answer was important to him. (See *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 246 [prosecutor would be expected to question juror about issue if reason had "actually mattered" to him]; *Harris v. Hardy* (7th Cir. 2012) 680 F.3d 942, 962 [failure to question about alleged concern demonstrated pretextual nature of reason].) Similarly, respondent argues

that prospective juror "Harris" indicated a belief that verdicts might not always be accurate. (RB 66.[4]) Harrison stated that she may not always agree with a verdict, but noted that it was based on her perspective as an observer. (15 RT 4349.) There is nothing remarkable about this statement. Again, the prosecutor did not question Harrison about it (38 RT 12656-12665), indicating that the answer did not particularly concern him. Indeed, it appears that Harrison was being careful to limit her opinion and would change her opinion if other facts came to light. In other contexts, she recognized that it was important to consider everything that she could when making her own decisions. (38 RT 12652.) Rather than provide obvious or apparent reasons in the record to explain a challenge, respondent's argument simply illustrates the dangers of relying on speculation to assess whether there is a prima facie case of discrimination. (See *Johnson v. California, supra*, 545 U.S. at p. 173.)

Respondent also conjectures that the prosecutor might believe that Graham and Harrison would be particularly sympathetic to mitigating evidence. (RB 66-67.) There was nothing in the record to indicate that either prospective juror could not be fair to the prosecutor or sympathize with his case. Graham, for instance, had friends who were police officers and had been the victim of a burglary or car theft. (15 CT 4728-4281.) Her school had its own police force that provided "excellent assistance" with

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[4] Respondent clearly meant to identify prospective juror Sharon Harrison, but cites to 15 CT 4351-4352, where Harrison simply states that she would not automatically vote for death. Appellant assumes that respondent meant to refer to Harrison's answer to Question No. 39, that she does "not always agree" with the verdict from the perspective of an observer, but she usually concurs with the sentence and believes that courts are usually fair in sentencing. (15 CT 4349.)

gang problems. (37 RT 12322-12323.) Harrison had started a foundation to house abused children, but had to be very selective with children who had criminal backgrounds. (38 RT 12660.) Thus, both prospective jurors had backgrounds that might make them sympathetic to the prosecutor's case. (AOB 85-86.) Respondent simply invites this Court to speculate otherwise. This does nothing to dispel the suspicion that the prosecutor's use of his strikes otherwise created. (*Williams v. Runnels, supra*, 432 F.3d at p. 1110.)

Respondent also states that prospective juror Holmes had a son who had been convicted of narcotics possession and rape, providing a reason for excusing her from the jury. (RB 67-68.) Even assuming that the prosecutor could have cited this as a reason to support his challenge, it does not dispel the inference of discrimination at the first level of the *Batson* inquiry. (*Johnson v. Finn, supra*, 665 F.3d at p. 1069 [grounds that could reasonably provide a basis for a challenge does not defeat prima facie case].)

Appellant was entitled to rely on the fact that peremptory challenges permits "those to discriminate who are of a mind to discriminate. (AOB 87, quoting *Batson, supra*, 476 U.S. at p. 96.) As discussed above, race continues to be a problem in jury selection. (*State v. Saintcalle, supra,* 178 Wash.2d at p. 49.) Even assuming that the record suggests possible grounds for a peremptory challenge, it does not establish that the prosecutor would have relied on those reasons or that the reasons would be upheld on review. Ultimately, it is the credibility of the prosecutor that must be measured. This cannot be done if a court bypasses the inquiry by speculating about potential reasons for a challenge. (*People v. Harris, supra*, 57 Cal.4th at p. 890 (concur. opn. of Liu, J.) ["jurisprudence of speculation and presumptions" does not produce actual answers in the

Batson inquiry].)

This Court should find that there was sufficient evidence to raise an inference of discrimination. The trial court's error requires reversal of the judgment against appellant. (See *Batson*, *supra*, 476 U.S. at p. 100; *People v. Fuentes* (1991) 54 Cal.3d 707, 720.)

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THE TRIAL COURT ERRONEOUSLY EXCUSED PROSPECTIVE JUROR LAURA COLOZZI FOR CAUSE BASED ON HER OPINIONS AND BELIEFS REGARDING THE DEATH PENALTY

Appellant has argued that prospective juror Laura Colozzi's views concerning capital punishment did not prevent or substantially impair the performance of her duties as a juror, and thus the trial court's decision to remove her for cause violated appellant's rights to due process and an impartial jury in violation of the Sixth and Fourteenth Amendments. (AOB 90-112.) Respondent argues that the court's decision was supported by substantial evidence. (RB 70-78.) There was no such substantial evidence. Respondent's argument relies on a mistaken understanding of the record, and is based on isolated answers by Colozzi to misleading questions and statements of law by the trial court. The full record of voir dire and the prospective juror's questionnaire show that Colozzi was wrongly excused for cause.

A. The Trial Court's Decision to Excuse Colozzi for Cause Was Not Supported by Substantial Evidence

Appellant and respondent agree on the general principles of law that control challenges for cause based on attitudes toward the death penalty. A prospective juror may be challenged for cause based on his or her views about capital punishment when those views would prevent or substantially impair the performance of the juror's duties as defined by the court's instructions and the juror's oath. (*Wainwright v. Witt* (1985) 469 U.S. 412 (*Witt*); *People v. Pearson* (2012) 53 Cal.4th 306, 327-331.) From this touchstone principle it follows that a prospective juror who is unable to conscientiously consider all of the sentencing alternatives, including death,

may be excluded. (*People v. Jones* (2012) 54 Cal.4th 1, 40; *People v. Heard* (2003) 31 Cal.4th 946, 958.)

Appellant and respondent also agree as to the standard of review for decisions to exclude prospective jurors for cause under *Witt*. (See RB 71.) When a prospective juror has made statements that are conflicting or ambiguous, an appellate court will uphold the trial court's ruling excluding the juror for cause if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind. (*People v. Cunningham* (2001) 25 Cal.4th 926, 975; *People v. Heard, supra*, 31 Cal.4th 946, 958.) But when the juror has not made conflicting or equivocal statements regarding his or her ability to impose either a death sentence or one of life in prison without the possibility of parole, the court's ruling will be upheld only if supported by substantial evidence. (*People v. Horning* (2004) 34 Cal.4th 871, 896–897.)

Respondent's primary argument is based on the premise that this is a case without conflicting or equivocal statements, and the issue therefore is whether the court's ruling is supported by substantial evidence. (RB 71, 72.) Appellant agrees with respondent's premise. Contrary to respondent's argument, however, appellant contends that the trial court's ruling is not supported by substantial evidence.

Respondent implies that appellant's argument is based on a selective reading of the relevant record, and that the entire record shows that Colozzi was substantially impaired. (RB 77.) Respondent is incorrect. A review of the entire record supports appellant's argument and shows that respondent's position is based on taking isolated answers out of context. In fact, the clearest, most consistent, and most abiding assessment of Colozzi's responses on her questionnaire and during voir dire is that she respected,

honored, and would follow the law. Colozzi was a legal secretary who worked for the State of California (15 CT 4216), and she repeatedly revealed herself to be a conscientious and thoughtful individual who could vote for death despite being an observant Catholic. In explaining that she would not automatically refuse to vote for death, Colozzi stated in her questionnaire, "No. As a fair-minded person and legal secty familiar with legalities I would make a judgment based on all factors before making any decision." (15 CT 4224.) She believed that the death penalty "needs to be a reminder to all who would endanger others;" it "protects the peaceful people." (15 CT 4225.)

During her voir dire Colozzi expanded upon, but did not contradict, her questionnaire answers. "[B]eing a legal secretary. . . and being in certain legal situations, myself, I understand that the law is the law. We live in a society. Laws are there for a reason, and I respect the law. *Despite sympathies I may have one way or the other, I understand the law must prevail.*" (37 RT 12332, italics added.) She assured the court that she was willing to "follow the guidelines and the guidance that the law gives to the jurors." She added, "I respect that." (*Ibid.*)

Regarding her Catholic faith, Colozzi explained that she had tried "to integrate [her] Christian beliefs with the real live world that we live in." (37 RT 12346.) She stated that there must be rules in society. "We need the rules to protect everyone. We can't let just a few endanger the others, and so, I live in the real world, too. This is society. There are laws. Regardless if I believe in them or not, they have to be followed to protect everyone." (37 RT 12346-12347.)

Since the filing of appellant's opening brief, this Court has addressed the issue of excluding prospective jurors with strong beliefs about the death

penalty in *People v. Mai* (2013) 57 Cal.4th 986, 1040-1046 (*Mai*) and *People v. Roundtree* (2013) 56 Cal.4th 823, 842-845. These cases serve to reaffirm the principle that such views either for or against the death penalty do not necessarily provide a basis to excuse a prospective juror on the ground of actual bias. Strong beliefs do not mean that a juror will be substantially impaired in performing her duties as a juror. (*Mai, supra*, 57 Cal. 4th at p. 1041.) Even where those beliefs would make it "very difficult" for the juror ever to choose and impose a sentence of death, the prospective juror is "entitled-indeed, duty bound-to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror." (*People v. Stewart, supra*, 33 Cal.4th 425 at p. 446.)

In *Mai, supra*, 57 Cal.4th at p. 1045, a prospective juror had expressed "unequivocal general support for the death penalty, conceded his pretrial impression that death was appropriate in this case, and asserted he started from the perspective that the defense had the burden of proving otherwise." This Court nevertheless upheld the trial court's determination that the prospective juror's view in favor of the death penalty did not prevent or substantially impair the performance of his duties because he "consistently indicated he could and would subordinate his views, carefully weigh and consider the aggravating and mitigating evidence as instructed, vote for either death or life without parole as appropriate, and sit fairly in accordance with the juror's oath." (*Ibid.*)

Similarly, in *People v. Roundtree, supra,* 56 Cal.4th at p. 823.) This Court ruled that a prospective juror at a capital murder trial who stated that he favored the death penalty and agreed that he would lean "95 percent" toward death if it was proven that murder occurred during a robbery and

kidnaping was not subject to excusal for cause. (*Id.* at p. 843.) The juror confirmed that he would "listen to all of the evidence," explained that mitigating evidence might influence him and, when asked whether evidence regarding defendant's childhood might have some weight in his mind, answered "you could make me understand in my mind exactly what happened, you know, when you get to be an adult, you can't say, well, it was something as a kid, but it could have a lot to do with it." (*Ibid.*)

When Colozzi was first told that she could vote for either death or life without the possibility of parole, regardless of whether mitigating factors outweighed aggravating factors, she candidly stated she preferred a sentence of life without the possibility of parole if she had the choice, but she was also quick to qualify that she would do so only if such a vote were in accord with the law. "I have the freedom of choice, and that's not against the law. I have that choice, and it's legal, and I would go for the life imprisonment." (37 RT 12348.) When defense counsel asked whether she would choose life "no matter what evidence the district attorney put on," Colozzi replied, "*If that is my legal choice, if I have a choice legally to do that, that's the way I would vote, yeah.*" (*Ibid.*, italics added.) Shortly after that, counsel asked whether there might be evidence that would lead her to say, "this is an appropriate case to apply the death penalty." He asked if Colozzi was prepared to follow that law and she replied, "Yes, I am." (37 RT 12350.) Colozzi, like the jurors in *Mai* and *Roundtree*, held strong personal views about the death penalty but firmly and consistently stated that she could and would follow the applicable law.

The burden of proof in challenging a juror for anti-death penalty views rests with the prosecution. (*People v. Watkins* (2012) 55 Cal.4th 999, 1016.) In the face of Colozzi's repeated and thoughtful answers indicating

her ability and willingness to follow the law, respondent seeks to meet its burden by focusing on a single, short exchange between Colozzi and the court about the role and obligations of a juror at the penalty phase of a capital trial. During that exchange, the trial court stated its observation that Colozzi would return a death verdict "if the law basically compelled it "and that this was because" you're willing to and feel the obligation to follow the law?" Colozzi agreed. (37 RT 12350.) The court explained that the law would never compel a death verdict, then asked, since Colozzi "made it clear you prefer, significantly prefer, life without the possibility of parole to the death penalty, and if the law is never going to force you, or direct you, or compel you to return a death penalty, is it true that, in effect you would be returning a life without the possibility of parole?" Colozzi explained that she "would have to say" yes. (37 RT 12351.) She stated she had not realized that "[t]here are not guidelines. There are no factors." (*Ibid.*) The court told Colozzi there were, in fact, guidelines, but they just "tell you when you can't give it, and it tells you when you may consider it, and possibly give it, but it never compels you to do it." (37 RT 12351-12352.) Colozzi said, "I see. Okay." Then, in response to no question, stated, "My answer is just, yes." (37 RT 12351-12352.) With that, the court excused Colozzi. (37 RT 12352.)

While acknowledging that Colozzi repeatedly stated she would follow the law and be fair and impartial, respondent concludes that this exchange constitutes uncontradicted evidence that Colozzi could not be fair and impartial, and would not follow the law because she "indicated that she would always vote to impose life without the possibility of parole even where 'the aggravating factors clearly and substantially outweigh the mitigating factors.'" (RB 77, citing 37 RT 12352.) Therefore, respondent

concludes, the trial court "correctly excused Colozzi because she could not consider imposition of the death penalty as a reasonable possibility where the law also provided a juror with the option of voting to impose life without the possibility of parole." (RB 77.) But respondent fails to consider Colozzi's answers in the context of the question posed by the trial court. Colozzi was essentially told that she could legally vote her preference – life without the possibility of parole – and then asked whether she would, in fact, vote her preference. (37 RT 12352.) When she said yes, she was excused for cause. The problem lies not in Colozzi's responses, but in the court's misleading and inaccurate statements of the law.

As explained in the opening brief, a penalty phase juror's freedom of choice "is not the completely unfettered freedom to choose life and death." (AOB 109.) The court's voir dire, however, led Colozzi to believe such was the case. Given her unequivocal and repeated statements regarding respect for the law and intention to follow the law regardless of her personal preferences, the court's voir dire was inadequate to determine whether Colozzi views would substantially impair the performance of her duties. The court must have "sufficient information . . . to permit a reliable determination" whether a prospective juror's views would disqualify the juror from service in a capital case. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 445; *People v. Thomas* (2012) 53 Cal.4th 771, 790 [same].)

Here the trial court never explained to Colozzi the juror's duty to assess the evidence, weigh the aggravating and mitigating circumstances, deliberate with the other jurors, and choose the appropriate penalty; it never asked whether she could engage in the weighing process; it never asked whether she would follow the court's instructions; and it never asked whether she could choose the "appropriate" penalty under the law.

Colozzi's responses throughout her voir dire suggest she would. But without additional information, and in light of Colozzi's high regard for the law and unequivocal statements that she would follow the law, the court's decision to excuse Colozzi is not supported by substantial evidence. (See *People v. Pearson*, *supra*, 53 Cal.4th at p. 330.)

The court's voir dire below, and Colozzi's responses, are comparable to those that occurred in *Heard*. There, the prosecutor challenged prospective juror H for cause, explaining,

> He admitted to the court that he felt that there were psychological factors in the background that would [lead him to] feel life without possibility of parole was the appropriate sentence. And he indicated when you pressed him, your honor, that he still felt that way, even though you gave him opportunities to back away from that position. [¶] My impression of the record is that he did not back away from that position, and he would not want to impose death if there were.

(*Heard*, *supra*, 31 Cal.4th at p. 963.)

Defense counsel countered, but the trial court granted the challenge:

> [Defense Counsel]: The circumstances in all of his answers, though, he consistently said that he would consider the factors in all of the evidence as instructed. And he kept emphasizing "whatever the law says and whatever I am told. I don't know the law." [¶] And I think once he gets the instructions, he would be able to follow [the law] because he kept emphasizing he would.
>
> The court: . . . Mr. [H.][,] I will excuse for cause. I think that his answers were such that I think he would, given background conditions, vote [for life in prison without possibility of parole]. I think he's although less articulate [than a different prospective juror], in the same sort of a ballpark. So Mr. [H.] is out. . . .

(*Heard*, *supra*, 31 Cal.4th at p. 963.)

This Court concluded that, despite the trial court's "imprecise

questioning," the prospective juror made it clear he would not vote automatically for life without the possibility of parole. "The circumstance that the existence of 'psychological factors' might influence H.'s determination whether or not the death penalty would be appropriate in a particular case certainly does not suggest that H. would not properly be exercising the role that California law assigns to jurors in a death penalty case." (*Heard, supra*, 31 Cal.4th at p. 965.) The record showed that, "in response to a series of awkward questions posited by the trial court, Prospective Juror H. indicated he was prepared to follow the law and had no predisposition one way or the other as to imposition of the death penalty. Prospective Juror H. generally was clear in his declarations that he would attempt to fulfill his responsibilities as a juror in accordance with the court's instructions and his oath. To the extent H.'s responses were less than definitive, such vagueness reasonably must be viewed as a product of the trial court's own unclear inquiries." (*Id.* at p. 967.)

Here, too, any indication that Colozzi had an unalterable preference for life without the possibility of parole was a product of the court's voir dire that was not merely "unclear" but affirmatively misleading.

The complete record reveals not only Colozzi's preference for life without the possibility of parole but also her intent to comply with the law, whatever it may be. Colozzi never once indicated she would ignore the law or not follow it or the court's instructions. (Compare *Smith v. McCotter* (5th Cir. 1986) 798 F.2d 129, 133-134 [prospective juror was properly excluded for cause where he stated that, under some circumstances, he would ignore law or violate his oath to avoid condemning someone to die].) To the contrary, she consistently stated her overriding intent to comply with the law and set aside her beliefs in deference to the rule of law.

Accordingly, there was no substantial evidence that Colozzi's views on the death penalty would prevent or substantially impair the performance of her duties as a juror in accordance with the trial court's instructions and her oath as a juror.

B. Any Conclusion That Colozzi Gave Conflicting Answers is Unsupported by the Record

Respondent perfunctorily offers an alternative argument based on the theory that Colozzi gave conflicting answers. (RB 77-78.) But the trial court gave no indication that Colozzi had given equivocal or inconsistent statements about which it had to make a factual determination. Nor has respondent specificed any of Calozzi's answers it deems conflicting. Respondent nevertheless states, "[t]o the extent that Colozzi gave conflicting answers, the trial court resolved those differences adversely to appellant by granting the challenge." (RB 77.) This is tautological reasoning. Respondent identifies no inconsistencies then claims this Court is bound by the trial court's resolution of such inconsistencies, and must conclude Colozzi was substantially impaired in her ability to carry out her duty as a juror. (RB 78.) The record does not support a finding that Colozzi gave conflicting answers or that she could or would not vote for the death penalty in a factually appropriate case.

C. The Error Requires Reversal of the Death Judgment

By erroneously excusing Colozzi for cause, the trial court denied defendant the impartial jury to which he was entitled under the Sixth and Fourteenth Amendments to the United States Constitution. Such error compels the automatic reversal of appellant's death sentence. (*Davis v. Georgia* (1976) 429 U.S. 122, 123; *Gray v. Mississippi* (1987) 481 U.S. 648, 668.) The sentence and judgment of death must therefore be reversed.

4

THE EVIDENCE THAT APPELLANT COMMITTED THE CRIMES AGAINST MARY SIROKY WAS INSUFFICIENT TO PRESENT TO THE JURY

Appellant argued in his opening brief that the trial court erred in refusing to exclude evidence of the attack on Mary Siroky because the fingerprint found on the clip of the gun used in the Siroky crimes was insufficient to prove beyond a reasonable doubt that he was the perpetrator of those crimes. (AOB 113-123.) The error allowed the prosecutor to introduce evidence to show that appellant raped, robbed and attempted to murder Siroky a few days after the capital crime, and to use these crimes as evidence in aggravation within the meaning of section 190.3, factor (b). Respondent contends that the evidence was sufficient, and that any error was not prejudicial. (RB 78-84.)

The principle underlying appellant's argument concerns the limitations on the use of fingerprints to prove the identity of the perpetrator of a crime: where identity of a perpetrator is based on fingerprint evidence, and the prosecution theory is that the fingerprints were placed on a object used while committing the crime, the record must contain other evidence from which the jury could infer the fingerprints were impressed at a time that implicated the defendant in the crime. (See, e.g., *Mikes v. Borg* (9th Cir. 1991) 947 F.2d 353, 361; *People v. Trevino* (1985) 39 Cal.3d 667, 696; AOB 116-120, and cases cited therein.) Respondent offers no disagreement with the general principle that some additional evidence is necessary in such "fingerprint-only" cases. Instead, respondent contends that this is not such a case because there were two additional pieces of identification evidence presented. (RB 83.) These were a composite drawing of the perpetrator created with Siroky's assistance, and the ammunition in the gun which

respondent claims was linked to the Cavallo crime scene. Neither of these pieces of evidence provided a sufficient basis upon which a jury could reasonably have inferred appellant committed the Siroky.

First, the composite sketch was not substantial evidence that appellant was Siroky's assailant. Even though she was shown photographs of appellant, Siroky was never able to identify appellant as the assailant until after being hypnotized. That identification was inadmissible at the present trial. (*People v. Johnson* (1988) 47 Cal.3d 576, 582, applying *People v. Shirley* (1982) 31 Cal.3d 18.)

While Siroky was hospitalized after being attacked, she was shown photographs of possible suspects on three separate occasions – a total of over fifty photographs. (41 RT 13308, 13313.) A few days after the crime, Siroky was shown a spread of eight photographs, two of which were of appellant. (People's Exhibit No. 4; 41 RT 13484, 13545-13546.) The photographs were all in color except for the two of appellant, which were black and white. (People's Exhibit No. 4; 41 RT 13545-13546.) Despite the bias in this photo spread, Siroky did not identify any of the photographs as being of her assailant. (41 RT 13546.) On the same occasion, she was shown a second spread of six photos which did not contain one of appellant, and she did not identify any of these pictures as being of the assailant. (People's Exhibit No. 4-A; 41 RT 134984-13485.)

Another occasion on which she was shown photographs of possible suspects was the day the composite was created. A police officer came with the sketch artist and showed her photographs of potential suspects. (41 RT 13310-13312.) Afterward, Siroky went to the police station to view the resulting composite sketch. (41 RT 13312.) When she saw that sketch (People's Exhibit No. 5), she wanted to make some changes. Changes were

made, but she was not shown the result before it was published in the newspaper. (41 RT 13313.) When she saw the published composite she felt it "resembled" the man that attacked her, but it was not as exact as she wanted it. (41 RT 13317.)

In sum, Siroky looked at photographs of appellant and did not identify him as the assailant and the composite sketch which was created based on Siroky's memory bore only an imprecise resemblance to an assailant. These facts alone clearly do not establish the composite as substantial evidence that appellant was Siroky's assailant. Respondent suggests, however, that when "juxtaposed" with a drivers license photograph of appellant, the composite acquires such substantiality. (RB 83.) Respondent apparently believes that some resemblance between the composite and that photograph provides evidence of appellant's identity as the assailant. But Siroky had already viewed over fifty photographs which were presumably selected because they bore a resemblance to the assailant as described by her, including two of appellant, and she had failed to identify any of them as the perpetrator. That the prosecutor could find one more such picture of appellant purportedly resembling the imperfect composite does not elevate that sketch to the level of substantial evidence of identity.

Second, the expert opinion linking the ammunition from the Siroky crime scene to the crime scene at Cavallo's house is similarly insufficient to support an inference that appellant was Siroky's assailant. Among the ammunition found at Cavallo's home was some Monarch brand .22-caliber long rifle cartridges manufactured by Federal Cartridge Company. (42 RT 13711.) There were cartridges found at the Siroky crime scene of the same type and caliber as those found at Cavallo's home. Some cartridges from

both scenes had "F" logo head stamps (indicating manufacture by Federal) that suggested that they had been struck by the same tool. (42 RT 13666-13668.) Respondent's point is based on the premise that this is "distinctive" ammunition, and its presence at both scenes supported an inference that the perpetrator of one crime was the perpetrator of the other. (RB 83.) But the ammunition is not, in fact, distinctive. Gerald Gourley, an expert in .22-caliber ammunition, testified that conceivably there could have been 100 million cartridges with the same mark created in light of the manufacturing techniques used by Federal Cartridge Company. (43 RT 14108.) There was no reason that boxes of ammunition with exactly the same "F" stamp could have been purchased in Sacramento and Santa Rosa at around the same time. Furthermore, properly stored ammunition has an unlimited shelf life. (43 RT 14116.) The ammunition was not distinctive, and did nothing to support the prosecution's theory that appellant was Siroky's assailant.

In *People v. Jenkins* (1979) 91 Cal.App.3d 579, 583-585, defendant's fingerprints were found on laboratory items used in the manufacture of PCP. The Court of Appeal found that the fingerprint evidence alone was insufficient to establish the element of dominion and control required to prove manufacture of PCP. The prosecution offered as additional evidence the fact that defendant used a false name while in custody and lied about having ever touched the laboratory items, noting that these were evidence of defendant's consciousness of guilt. The Court of Appeal found the evidence insufficient to establish dominion and control. Acknowledging that there was consciousness of guilt evidence, Presiding Justice Kaus noted that "the People's argument confuses admissibility with sufficiency to support a finding." (*Id.* at p. 585.) He characterized this as

an attempt to use the consciousness of guilt evidence as "evidentiary wild cards with which the prosecution can turn a pair of deuces into a full house." (*Ibid.*) The prosecution is playing an equally weak hand in the present case. The composite and ammunition were insufficient to turn evidence of appellant's fingerprint at the scene into proof beyond of reasonable doubt of appellant's identity as Siroky's attacker.

Respondent also attempts to distinguish this case from other "fingerprint-only" cases by claiming that the position of the fingerprints on the ammunition clip showed that appellant loaded the gun used in the Siroky assault. But the manner in which appellant may have touched the clip was not the issue here. The gun was a moveable object which could have been passed from one person to another with appellant's fingerprint on the clip, and brought to the Siroky crime by someone other than appellant.

Respondent claims that even if there was error there was no prejudice because it must be presumed that the jury followed the instructions requiring that they only rely on crimes alleged under factor (b) when there is evidence proving beyond a reasonable doubt that defendant committed those crimes. Here, however, the sufficiency of the Siroky evidence was fully litigated in the trial court, and the court erred in determining that the evidence was sufficient. The jury instructions would not immunize the jury from making the same error as the trial court. Furthermore, as argued in appellant's opening brief, this Court has acknowledged that there is an inherent risk that juror's hearing evidence of uncharged crimes under factor (b) will be influenced by the prejudicial effect of such evidence even if not convinced of defendant's guilt of those crimes. (*People v. Yeoman* (2003) 31 Cal.4th 93, 132; *People v. Caro* (1988) 46 Cal.3d 1035, 1057.) That is particularly true in this case where a

large portion of the entire prosecution case involved attempting to prove the Siroky crimes. Given that the first penalty retrial jury was unable to reach a verdict (4 CT 984), and that the jury in this case deliberated for five court days (6 CT 1330), the impact from evidence alleging that appellant raped, robbed and attempted to murder Siroky inevitably influenced the jury to sentence appellant to death.

Accordingly, respondent has not shown beyond a reasonable doubt that the harm from the error did not affect the jury's sentencing decision. (*Chapman v. California, supra,* 386 U.S. at p. 24) There is a reasonable possibility that the jury would have returned a verdict of life without the possibility of parole in the absence of the error. (*People v. Brown* (1988) 46 Cal.3d 446, 448.) The judgment of death must therefore be reversed.

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5

HEARSAY STATEMENTS OF ALDO CAVALLO WERE ERRONEOUSLY ADMITTED

In his opening brief, appellant argued that the trial court erred in introducing inadmissible hearsay statements of the murder victim, Aldo Cavallo, purportedly made to his friend, Richard Canniff. (AOB 124-134.) Canniff testified at appellant's first trial in 1981, but died before this retrial.

Cavallo and Canniff had been friends for four or five years at the time of Cavallo's death. Canniff could not remember exactly when the conversation in question occurred, but it would have been sometime during their friendship. At issue were Canniff's report of a conversation in which Cavallo said he had a gun in his home and that he kept it in the night stand in his bedroom. (See AOB 128-134.) The prosecutor sought to admit these statements for the truth of the matter asserted therein to support his contention that Cavallo had a habit of keeping a gun in his night stand. Evidence of a gun in the night stand was, in turn, important to the prosecutor because it offered support for its theory that the gun used in the Mary Siroky assault, which had appellant's fingerprint on it, was stolen from the night stand by appellant during the burglary-murder at Cavallo's house. In this way, the evidence bolstered the prosecutor's case in aggravation on both the circumstances of the charged murder and proving the Siroky assault.

Appellant's central points in his opening brief were that (1) the statement, offered for the truth of the matter asserted was inadmissible hearsay, and (2) there is no exception to the hearsay rule for evidence of habit and custom. (AOB 128-132.) Respondent, in fact, acknowledges that evidence of habit and custom by statute must be otherwise admissible and

that hearsay without an exception is inadmissible. (RB 88.) Furthermore, respondent makes no claim that the statement that Cavallo kept a gun in his night stand was properly admitted for the truth of the matter asserted. (See RB 88.) As such, it appears respondent has conceded appellant's principal point, although without directly acknowledging doing so. Appellant has fully briefed why the Canniff testimony was inadmissible in his opening brief (AOB 124-134), so no further discussion of the merits of the issue is necessary in this reply.

Respondent instead contends the issue has been forfeited and that, regardless of whether the evidence was incorrectly admitted hearsay, it was properly admitted for a permissible non-hearsay purpose. (RB 87.) Respondent is incorrect; the issue was not forfeited. Furthermore, whether the evidence was admitted for a non-hearsay purpose in addition to being admitted as hearsay is irrelevant to the issue on appeal.

A. The Issue Was Not Forfeited

Appellant filed a motion to exclude Cavallo's hearsay statement on July 6, 1992. (5 CT 1138.67-1138.70.) On July 9th the court received a copy of Canniff's prior testimony for review (31 RT 10663) and it heard argument on the motion on July 17 (32 RT 10927-10941). On or before August 24, 1992, the court denied the motion by telephonic notice to the parties. (40 RT 13188.) On August 25, the court made a record of the fact that it had notified the parties that it had ruled that Canniff's testimony from the 1981 trial was admissible. (40 RT 13211.) On September 1, 1992, Canniff's prior testimony, along with the prior testimony of six other witnesses was read in open court to the jury. (43 RT 13896-13906 [Canniff].)

Appellant's motion and the court's adverse ruling preserved the issue

for appeal. An in limine motion is a sufficient manifestation of an objection to protect the record on appeal when it satisfies the basic requirements of Evidence Code section 353; (1) a specific legal ground for exclusion is advanced and subsequently raised on appeal; (2) the motion is directed to a particular identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context. (*People v. Morris* (1991) 53 Cal.3d 152, 189-190; *People v. Crittenden* (1994) 9 Cal.4th 83, 127.) Appellant has clearly met each of these requirements; he moved to exclude the evidence as inadmissible hearsay, and makes the same argument in this appeal; his motion was directed toward the discrete prior testimony of Canniff; and his motion was heard shortly before the beginning of trial. Appellant needed to do nothing more to preserve the issues. Furthermore, respondent has not pointed to any event in the trial occurring after August 25 and before the prior testimony was offered that changed the context of the evidence in such a way as to constitute a basis for reconsidering the ruling. (*People v. Morris*, *supra*, 53 Cal.3d at p. 189.)

Respondent nevertheless argues that appellant "abandoned" the issue on September 1, 1992, just before Canniff's testimony was read to the jury. (RB 87.) Respondent's argument is built on the faulty premise that when the court ruled in August on appellant's motion to exclude Canniff's testimony, it was making only a tentative ruling. (RB 86.) Respondent's argument is based on a simple misunderstanding of the record.

The court made clear on August 25 that it had ruled that Canniff's testimony was admissible. (40 RT 13211.) It then noted that there was one statement in the prior testimony in which Canniff recounted Cavallo saying that he had a loss of hearing in one ear – a minor point which had not been a

concern of appellant in his motion to exclude Canniff's testimony. The court indicated that it would consider striking that statement from Canniff's testimony if the prosecutor could not otherwise corroborate that point. The court acknowledged that it was uncertain whether the defense was even seeking to have the statement of the hearing loss excluded; it recalled that the defense objections were primarily to references to the weapon being kept near the bed. (40 RT 13211-13212.)

The prosecutor offered to take the statement about hearing loss out of Canniff's prior testimony. (40 RT 13211-13212.) The court said that before he ordered that statement taken out, he wanted to know if the defense was seeking to have it excluded. (40 RT 13212.) Defense counsel Ogulnik said he was uncertain at that time and wanted to consult with co-counsel Masuda. (40 RT 13212.) The court indicated it needed a decision before Canniff testified and that it would allow counsel to address the matter before Canniff's testimony was read. (40 RT 13212.)

On September 1, the prosecution's case-in-chief was complete except for the reading of prior testimony from the seven unavailable witnesses. Five of these witnesses were deceased, including Canniff. The parties stipulated to the reading of prior testimony of Paul and Ludwig Saccomano, who had planned to be traveling at the time of trial. (43 RT 13836-13837.) The prosecutor described who the other unavailable witnesses were, and as to Canniff noted that he had removed the statement about hearing loss from the transcript of Canniff's testimony. (43 RT 13836-13837.) As to the deceased witnesses, the court asked the defense if there was any question as to their being dead. The defense said there was no issue. (43 RT 13838.) The court then asked, "Okay, does the defense then object to the reading of any of the witnesses' testimony as proposed by

the People?" (43 RT 13838:4-6.) Masuda responded, "No, but the only thing I wanted to make sure of is if there was any objections that whether or not they are going to be editing out or not." (43 RT 13838.) The prosecutor indicated he had edited out objections, and Masuda expressed satisfaction with that. (43 RT 13838.)

Those two answers by Masuda are apparently the wellspring of the abandonment that respondent claims to have found on this issue. Respondent's position is unreasonable. The parties are clearly dealing with the ministerial details of presenting prior testimony, not litigating the admissibility of the Canniff statements. The only thing that was tentative about the court's ruling on the Canniff testimony was whether the statement about Cavallo's hearing loss would be excluded.

This case is similar to *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1112-1113, where the court denied defendant's in limine motion to exclude a videotape. When later in the trial, the prosecutor offered the tape, the trial court asked defense counsel, "Your objection to it being admitted?" Defense counsel responded, "I believe it's the one we've been over before. No objection." This Court concluded that counsel's remarks were not an abandonment of his earlier objections but an indication of his "intent to preserve such objections but to raise no additional ones." (*Ibid.*)

Appellant's point is further supported by his new trial motion filed on October, 28, 1992. (6 CT 1333.) One of the bases for a new trial he argued was the erroneous introduction of Canniff's testimony. (6 CT 1334.) The prosecutor, in his response to the motion made no claim that appellant had forfeited or abandoned the issue on September 1. (6 CT 1352.) The issue was properly preserved.

B. Whether the Evidence in Question Was Admissible to Show Cavallo's Then-existing State of Mind Is Irrelevant to this Issue

Faced with an indefensible ruling on the hearsay issue, respondent claims that, besides being admitted on the theory that Cavallo's statements were evidence of habit, the statements were admitted "for the non-hearsay purpose to show that the victim was asleep when he was killed." (RB 87.) On July 8, 1992, respondent filed points and authorities in support of allowing Canniff's prior testimony. (5 CT 1139.1-1139.6.) That pleading argues that hearsay evidence of habit and character are admissible, not that there is a non-hearsay basis for admitting Canniff's testimony. Respondent has provided no citation to the record for its assertion that the court admitted the evidence for a non-hearsay purpose, and appellant believes that none exists.

More significantly, if the statements were in fact admitted for a non-hearsay purpose – that is, not being offered for the truth of the matter asserted – then this theory of admissibility is essentially irrelevant to the issue here on appeal. Appellant's argument is not concerned with whether the victim was asleep or not. Rather, it is about Cavallo's hearsay statements being used to prove he had a gun in his night stand. If, as respondent claims, the statements about having a gun in the night stand were not being offered for the truth of the matter asserted under this previously-undisclosed theory, then the jury would not have been able to consider them for that purpose. In short, if this Court were to find that Cavallo's statements were inadmissible as habit evidence, but admissible under respondent's state of mind theory, appellant would still have been prejudiced by the erroneous admission of habit evidence because the jury was wrongly allowed to consider the statements for the truth of the matter

asserted.

C. The Error Was Prejudicial

Appellant has set out at length how the admission of Canniff's testimony harmed appellant's penalty phase defense (AOB 133-134) and will not repeat those arguments here in their entirety. Respondent downplays the significance to the prosecution of showing that there was a gun in the night stand, suggesting that there was evidence that at some time in the past Cavallo owned a weapon similar to the one used in the Siroky assault. (RB 89.) But "similar" would do little to provide the connection between the Siroky and Cavallo crimes that the prosecutor sought. The gun found at the Siroky scene was a .22-caliber semi-automatic; Cavallo's ex-wife testified that indeed Cavallo had once owned a "similar" weapon, except that it was a revolver (43 RT 14037). The prosecutor wanted evidence that the specific gun used in the Siroky crime had been taken from Cavallo's night stand, and Canniff's prior testimony about Cavallo's supposed "habit" was the best he had.

Canniff's prior testimony was inadmissible; the sentence and judgment of death therefore must be reversed.

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EVIDENCE THAT APPELLANT DID NOT APOLOGIZE TO FLORENCE MORTON ON ONE SPECIFIC OCCASION WAS INADMISSIBLE PENALTY PHASE EVIDENCE

Over appellant's objection, the trial court permitted testimony that appellant did not apologize to Florence Morton when she and her husband visited him at Patton State Hospital (Patton). In his opening brief, appellant argued that the trial court erred because this evidence was irrelevant as aggravating evidence under section 190.3, whether considered as evidence of prior violent conduct under factor (b) or of a prior conviction under factor (c). (AOB 135-142.) Respondent's principal arguments in support of the trial court's ruling are that appellant's failure to volunteer an apology to Morton on this specific occasion was (1) a circumstance of the assault on Morton months earlier, (2) evidence of appellant's lack of remorse for committing that crime and (3) admissible rebuttal evidence. (RB 92-94.) All of respondent's arguments are wrong.

A. Appellant's Non-Statement to Morton at Patton State Hospital Was Not a Circumstance Surrounding, or Pertinent To, the Assault Which Occurred Months Earlier

The rationale for permitting evidence of a capital defendant's other violent criminality under factor (b) is that it is relevant to show the defendant's propensity for violence. (See, e.g., *People v. Balderas* (1985) 41 Cal.3d 144, 202.) The probative value of factor (b) evidence lies in the conduct of the defendant that gives rise to the offense. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1146; *People v. Davis* (1995) 10 Cal.4th 463, 544.) The conduct that gave rise to the assault and threat against Morton occurred in December 1971. The visit Morton made to Patton was months, and

possibly more than a year later.

Appellant does not contend that during the penalty phase the prosecution is limited to proving only the elements of the factor (b) crime; this Court has made clear that factor (b) evidence includes not just the violent criminal activity itself, but "also the pertinent circumstances thereof." (See *People v. Ashmus* (1991) 54 Cal.3d 932, 985; see also *People v. Benson* (1990) 52 Cal.3d 754, 788 [prosecution may prove "any pertinent circumstance of the criminal activity"]; *People v Bradford* (1997) 15 Cal.4th 1229, 1377-1378.) This Court has also stated that when the prosecutor has evidence that meets the requirements of factor (b), evidence of "the surrounding circumstances is admissible to give context to the episode." (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1013-1014; see also *People v. Kipp* (2001) 26 Cal.4th 1100, 1134; *People v. Livaditis* (1992) 2 Cal.4th 759, 776-777.)

Respondent apparently contends that appellant's non-statements were admissible as a circumstance of the assault on Morton, despite the fact that the visit to Patton occurred months afterwards. (RB 91, 93.) Respondent is incorrect; the non-statements were not a circumstance of the crime. This Court has had numerous opportunities to apply these principles in capital cases, and none of them supports the idea that appellant's non-statements to Morton months after the assault were a circumstance of that crime.

In *People v. Keenan* (1988) 46 Cal.3d 478, 526 the factor (b) crime was a threat against a witness. The prosecution was permitted to present evidence that defendant committed a burglary which was seen by the witness and provided context for the subsequent threat. In *People v. Kipp*, *supra*, the factor (b) crime was a failed attempt to escape from jail.

Defendant's threat directed to a deputy sheriff who subdued him after the failed escape was relevant to understanding the violent potential of defendant's escape attempt. (*People v. Kipp, supra,* 26 Cal.4th at p. 1134.) In *People v. Mendoza* (2000) 24 Cal.4th 130, 184, defendant's flight from the police after committing an assault was part of a continuing course of criminal activity and therefore admissible.

The factor (b) crime in *People v. Livaditis, supra,* was a violent resisting of arrest. The prosecutor was permitted to show the non-violent criminal activity (possession of cocaine and stolen goods) that led to the arrest because it was part of a continuous course of criminal conduct and gave context to the violent act. (*Id.* at pp. 776-777.)

People v. Wallace (2008) 44 Cal.4th 1032, 1080-1081, cited by respondent, rather than supporting respondent's position is simply another case consistent with those cited above. The factor (b) crime in Wallace was brandishing a weapon. The victim informed the police and defendant was immediately arrested. Evidence that defendant then resisted arrest was admissible evidence of the circumstances surrounding the crime of brandishing.

These cases are completely unlike appellant's. Priestly and Florence Morton went to visit appellant at Patton State Hospital months after the crime.[5] What was or was not said during that meeting cannot reasonably be

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[5] The prosecutor made no effort to establish when this visit occurred. The attack on Morton was in December 1971. At the first retrial, Morton testified that the visit took place when her baby was about 11 months old – around the end of 1972, which would have been about a year after the assault. (26 RT 9100.)

(continued...)

considered a circumstance either "surrounding" or "pertinent to" the assault on Morton the previous December. Furthermore, nothing about the visit to Patton, much less appellant's non-statements, provided any "context" to the crime.

Respondent also discusses at some length how the foreseeable effects of prior violent acts under factor (b) can be admissible as circumstances of the prior act (RB 91-92), and cites numerous cases in support of that general point. (See e.g., *People v. Jones* (2012) 54 Cal.4th 1, 72 [lasting effect of stabbing on victim]; *People v. Demetruilias* (2006) 39 Cal.4th 1, 39 [effect of attack on victims's physical and mental condition].) Appellant does not disagree with this general point; the injuries suffered in a crime of violence is a circumstance of that crime. (See *People v. Ashmus*, *supra*, 54 Cal.3d at p. 985 ["pertinent circumstances" of an assault included fact that victim suffered a bruise and a sprained arm as a result of the crime].) But respondent never even attempts to explain how this point is relevant to the present case, and it is indeed irrelevant. The absence of particular statements by appellant to Morton during a meeting months after the crime was not an "effect" of the crime, and Morton did not provide any evidence as to how appellant's non-statements on that occasion had any effect on her, either foreseeable or unforeseeable. This line of cases is completely irrelevant to the present issue.

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[5](...continued)
Other evidence at the penalty phase showed that appellant was at Patton in 1974 (45 RT 14426), suggesting the meeting may have taken place more than a year after the assault.

B. Morton's Testimony Was Not Admissible as Evidence of Lack of Remorse

Respondent asserts that the non-statements were admissible as evidence that appellant lacked remorse for his assault on Morton. (RB 93.) Respondent is wrong for several reasons. First, Morton's testimony was not substantial evidence that appellant lacked remorse. The evidence was that on one specific occasion, on an unspecified date many months after the crime, appellant did not expressly make an apologetic statement to Morton. Respondent seems to have made an unstated assumption that appellant was asked to apologize on this visit, and that he affirmatively refused to do so. There is no evidence to support such assumptions. There is no evidence that appellant was asked to apologize on this or any other occasion, that he ever affirmatively refused to do so, or otherwise expressly indicated after the crime that he had no remorse.

Evidence from the first retrial illustrates how unjustified it would be to infer a lack of remorse from appellant's silence. At the first retrial, Morton testified that she visited with appellant on two occasions other than the visit at Patton. One visit was in the Sacramento County Jail about ten years prior to the first penalty retrial – that is, around 1982. (26 RT 9098.) Morton testified that during that visit appellant told Morton that "he couldn't undo what had happened.[¶] Couldn't go back and undo what had happened, the pain and so forth. But he was – showed he regret [sic] that he had hurt me." (26 RT 9099.) Morton also described the visit to Patton. On cross-examination, the prosecutor asked if appellant had apologized on that occasion, and Morton said she did not recall him doing so, "but he was talking and holding the baby and playing with the kids." (26 RT 9100.) Morton acknowledged talking to the prosecutor and his investigator, but

denied saying appellant never showed remorse. She explained, "I just mentioned that – well, at the first Patton Hospital that I don't recall that he just – he didn't say sorry, but he was talking, you know, and just so forth. But he just didn't mention it. He just – he just talking like anybody, like a normal person." (26 RT 9103.) A photograph from one of the visits (Defendant's Exhibit E from the first retrial) shows appellant and Florence Morton together with appellant's wife, Ruth. (26 RT 9098.) The bare evidence that appellant did not make a statement of apology to Morton when she visited him at Patton does not support an inference that appellant lacked remorse for the crime against her.

The second reason respondent is wrong is that even if appellant's non-statement in the meeting at Patton could raise an inference that appellant lacked remorse, it was nevertheless irrelevant as factor (b) evidence. Respondent makes the broad assertion that the presence or absence of remorse is a relevant factor in the jury's penalty decision, but relies on cases concerning remorse for the capital crimes, not factor (b) crimes. (RB 92-93, citing *People v. Ghent* (1987) 43 Cal.3d 739, 771; *People v. Keenan* (1988) 46 Cal.3d 478, 510; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1232; *People v. Enraca* (2012) 53 Cal.4th 735, 767.) Similarly, respondent claims that the prosecutor may comment on a defendant's lack of remorse, but again cites only cases in which the prosecutor argues lack of remorse as to the capital crimes. (RB 94, citing *People v. Castaneda* (2011) 51 Cal.4th 1292, 1346; *People v. Brady* (2010) 50 Cal.4th 547, 585.)

As to a charged capital murder, "[c]onduct or statements demonstrating a lack of remorse made at the scene of the crime or while fleeing from it may be considered in aggravation" as a circumstance under

section 190.3, factor (a). (*People v. Bonilla* (2007) 41 Cal.4th 313, 356; *People v. Pollock* (2004) 32 Cal.4th 1153, 1184.) On the other hand, evidence of remorselessness *after* the capital crime "does not fit within any statutory sentencing factor, and thus should not be urged as aggravating." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1232; see *People v. Collins* (2010) 49 Cal.4th 175, 227.)

Here, respondent is claiming that post-crime lack of remorse, which respondent infers and speculates exists from the lack of a specific statement of apology on a specific occasion, long after the crime, is a circumstance of a factor (b) crime, but offers no authority for this proposition. (RB 93.) Respondent ignores the fact that the limited purpose of factor (b) evidence is to show appellant's character for violence. (*People v. Balderas*, *supra*, 41 Cal.3d at p. 202.) Whether appellant does or does not express remorse at some point following a crime of violence is irrelevant to whether the underlying crime tends to show his character for violence.

C. Appellant's Non-Statement Was Not, and Could Not Have Been, Admitted as Rebuttal Evidence

Respondent believes that even if the evidence was not otherwise admissible, it could have been admitted to rebut appellant's evidence of mental disease or defect. Respondent claims that appellant's failure to apologize showed that mental health treatment did not improve appellant's ability to accept responsibility for his actions or to feel empathy for his victims. (RB 94.)

From the simple facts that appellant was incarcerated at Patton and did not apologize to Morton during one meeting there, respondent infers that appellant (1) was receiving mental health treatment appropriate for schizophrenia, (2) that the treatment was unsuccessful, (3) that appellant's

failure to offer Morton an apology was evidence of that failed mental health treatment, (4) that the failed treatment supported a further inference that appellant was not suffering from schizophrenia or a brain injury, but rather had an incurable personality defect, and (5) that these inferences constituted credible evidence to rebut appellant's mitigation evidence that he suffered from a mental disease or defect. Appellant submits that this strained argument is so clearly unsound that it needs no further discussion.

D. The Trial Court's Ruling Is Not Entitled to Deference

Respondent contends, "The court overruled appellant's objection, finding that the question called for a relevant circumstance that could provide context for the jury's consideration of the underlying offense." (RB 91, citing 42 RT 13815.) The court made no such finding. The entirety of the court's ruling, as set out in appellant's opening brief, was "I will permit it. It relates to this incident. I will permit it." (42 RT 13815; AOB 136-137.)

Respondent's mischaracterization of the court's ruling is significant because the court's actual ruling reflects the application of an erroneous standard of admissibility. As discussed in Section A., the "pertinent circumstances" or the "surrounding circumstances" of a factor (b) crime are admissible. The trial court's determination that appellant's non-statements "relates to the incident" would seem to allow evidence to be admitted which was not remotely or even tangentially connected to the underlying crime. As shown above, the events at Patton were neither pertinent nor surrounding circumstances of the Morton assault.

Accordingly, to the extent that the trial court's ruling could otherwise be considered within the bounds of its discretion, no deference is due.

E. The Error Was Prejudicial

Respondent states that "it is difficult to conceive" how admission of this evidence could have changed the outcome of the trial. (RB 94.) But respondent has simply ignored a clear indicator that the jury was affected by Morton's testimony: during deliberations the jury made a written request for a re-reading of Morton's testimony, asking "especially re, threat & her visit to Johnson, (while he was incarcerated)." (6 CT 1325, 1326; AOB 141.) The jury's interest in Morton's testimony is understandable. "[R]emorse is universally deemed a factor relevant to penalty" for capital crimes. (*People v. Keenan*, *supra*, 46 Cal.3d 478, 510.) But the jury should not have been considering the presence or absence of that universal factor for a factor (b) crime.

The Mortons were particularly sympathetic figures. They took appellant into their lives after he was released from prison, and continued to visit him even after he attacked Florence Morton and returned to prison. Jurors could seize on this isolated piece of inadmissible evidence regarding lack of remorse to judge appellant unsympathetically. There is therefore a reasonable possibility that the jury would have returned a verdict more favorable to appellant had the error not occurred. The judgment of death must therefore be reversed.

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THE TRIAL COURT ERRED BY ADMITTING LANCE ERICKSON'S TESTIMONY ABOUT APPELLANT'S STATEMENTS IN 1971

Appellant has argued that the trial court erred in allowing Officer Lance Erickson of the California Highway Patrol (CHP) to testify regarding certain statements purportedly made to him by appellant 20 years earlier. (AOB 143-156.) Both parties were aware that appellant was arrested by Erickson in 1971 for car theft and during that arrest made an admission that nine days earlier he had assaulted and may have killed Florence Morton. But until the eve of Erickson's testimony, not even the prosecutor had heard the story Erickson had to tell, which was that during appellant's arrest for car theft, appellant purportedly stated that days earlier he had assaulted Morton because she "came on" to him. (42 RT 13582.) Appellant contends that he did not receive adequate notice of this evidence and, regardless of the adequacy of the notice, the evidence was irrelevant. (AOB 143-156.) Respondent disagrees with both points. (RB 95-105.)

A. Appellant Did Not Receive Adequate Notice of the New Statements

The facts relevant to the notice issue are not in dispute. On February 11, 1991, the prosecutor filed and served a 46-name list of witness which included, in its entirety, this reference to Erickson: "OFF. ERICKSON, CHP, L.A., #7455." (4 CT 985-986.) Neither party had Erickson's 1971 report of this incident, and it was assumed to be lost; there was a report from the Los Angeles Police Department that had been based on Erickson's CHP report that both parties had. (42 13639.) That report included the fact that appellant had made a statement about the Morton incident to Erickson at the time of arrest, but it did not include appellant's purported statement

that Morton had "come on" to him. (42 RT 13591.) The prosecutor's trial brief, filed July 6, 1992 (4 CT 1138.27), states that ". . . in conjunction with the circumstances surrounding this offense [i.e., the Morton assault] the People intend to introduce the testimony of Lance Erickson, one of the Highway Patrol officers who arrested the defendant in 1971 and that the defendant, according to Mr. Erickson, calmly made a statement admitting his culpability in the offense shortly thereafter." (5 CT 1138.54.) These items were the only notice the prosecutor provided as to Erickson's testimony until August 27, 1992 – the day Erickson testified, and the day after Officer Erickson told the prosecutor specific statements that appellant allegedly said to him, twenty years prior.

The trial court ruled that appellant had received sufficient notice of the new information provided by Erickson based on the "police report that indicates that there was some statement made to the Highway Patrol about the Florence Morton incident. Either side could have explored that and been ready for it." (42 RT 13639.) Both sides knew that twenty years earlier appellant made a statement to Erickson admitting that he had assaulted Morton. Neither side knew the additional informationd, including appellant's alleged statement that Morton had "come on" to him, until the day before he testified and the defense did not know until the following day, which is when Erickson testified. The Los Angeles Police Department's report that was based on Officer Erickson's encounter with appellant, and had been timely provided to appellant, had no mention of the statement at issue. Given that the prosecutor did not know the contents of the statement until the night before Erickson was to testify, the court was ruling that the prosecutor gave appellant adequate notice of the evidence at issue here long before the prosecutor even knew that evidence existed. This anomalous

result was erroneous under the facts of this case.

Notice under section 190.3 will be deemed sufficient only if it gives the defendant a reasonable opportunity to respond. (*People v. Arias* (1996) 13 Cal.4th 92, 166.) Applied to notice of factor (b) crimes, the general rule that when notice is given that evidence of a particular crime will be offered under factor (b), that notice serves to alert counsel that evidence of all crimes committed as part of the same course of conduct may be offered. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1146-1147; *People v. Farnam* (2002) 28 Cal.4th 107, 175; *People v. Cooper* (1991) 53 Cal.3d 771, 840 (*Cooper*).) Respondent relies on *Cooper*, apparently claiming that appellant's encounter with Erickson was part of the same course of conduct as the assault on Morton. (RB 100.) But that case actually serves better to illustrate how different the instant case is from those in which unnoticed facts were part of a course of conduct.

In *Cooper* the prosecution gave notice that it would present evidence that defendant committed a rape, robbery and assault with a deadly weapon and referenced six pages of police reports provided to the defense in discovery. At trial, the prosecution presented evidence that during this same course of conduct, the defendant also burglarized the victim's home and committed theft offenses. Defendant's claim that he lacked notice of the burglary and theft offenses was rejected by this Court because they were committed as part of the same conduct, and there was no indication the discovery did not mention the burglary or thefts. (*Id.* at p. 842.) The obvious distinction between the instant case and *Cooper,* as well as the other cases in this line, is that nine days passed between the Morton crime and the encounter with Erickson. The assault on Morton and appellant's arrest nine days later were distinct incidents and respondent does not

explain how they were, or could possibly be, part of a single course of conduct. (See AOB 150.)

If the statement was not part of a course of conduct that included the assault on Morton, then no notice was given. Respondent nevertheless believes that adequate notice was effected by providing appellant with two items: the 46-name witness list which included Erickson's name, and the LAPD report based on Erickson's report that included information that appellant made a statement to Erickson. (RB 149.) Respondent fails to mention that the prosecutor acknowledged that the information Erickson provided to him shortly before testifying was not included in that report. Respondent also fails to mention that the prosecutor's trial brief specified that Erickson was being called as a witness to testify that appellant admitted to assaulting Morton. Appellant pled guilty to the Morton crime in 1972, so this admission to Erickson was not a fact he would contest in the present trial. Notice of that admission, without more, would not give the defense a reason to investigate the Erickson incident.

The sufficiency of the notice must be assessed in light of the purpose of the notice requirement, which is to inform a defendant of the evidence against him so that he will have sufficient opportunity to prepare a defense to the aggravating evidence. (See AOB 149.) Neither the witness list nor the police report informed appellant of the evidence against him when the prosecutor, armed with the same material, was not even aware of that evidence and the defense would have no reason to investigate an admission he did not plan to contest. The notice was therefore inadequate.

Because the trial court ruled that appellant had been given sufficient notice, it refused to give appellant a continuance. This too was error. The trial court should have given appellant a reasonable period of time to meet

the evidence after the prosecutor gave actual notice on August 27. Section 190.3 provides that, except for evidence of the charged offense and the special circumstances, "no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time. . . prior to trial. (§ 190.3.) When new evidence arises during trial, the defendant is entitled to prompt notice of it, and a reasonable continuance to enable him to meet that evidence, if necessary. (*People v. Jennings* (1988) 46 Cal.3d 963, 987.) After learning of the new evidence the prosecutor intended to present, appellant asked for time to investigate the incident, including the opportunity to interview Erickson's partner at the time, Aldon Summers, who was present during the incident. Appellant wanted to be able to conduct this investigation prior to Erickson's testimony. (42 RT 13588-13589.) The purpose behind the notice requirement is to inform a defendant of the evidence against him so that he will have sufficient opportunity to prepare a defense to the aggravating evidence. (*People v. Howard* (2008) 42 Cal.4th 1000, 1016.) The untimely notice of the aggravating evidence presented here required that appellant be provided the opportunity to investigate, prepare and defend against that evidence and the court erred by denying appellant's request for a continuance.

Respondent apparently believes that appellant was not harmed by the lack of a continuance because "the prosecution investigator had located Summers, who contacted defense counsel to relate his recollection of the events in question." (RB 102.) Erickson testified on Thursday, August 27, 1992. (42 RT 13671-13682.) The prosecutor informed the court on September 1 that the investigator had located Summers and that defense counsel had the opportunity to talk to him. Erickson, however, was no

longer available to be cross-examined. He left on vacation after testifying and said he would not be available until "the week after the 10th of September" (42 RT 13682; see also 42 RT 13590), which would be the week beginning Monday, September 14. The evidentiary phase of the trial ended September 11. (6 CT 1209.) Furthermore, the defense wanted time to investigate the entire incident including, but not necessarily limited to, interviewing Summers. The fact that the prosecution was able to locate Summers did not negate or ameliorate the court's error.

B. The Evidence Was Inadmissible

Regardless of the question of notice, the evidence was inadmissible as evidence in aggravation. Respondent does not attempt to support the "consciousness of guilt" theory propounded by the prosecutor at trial. (See RT 41 RT 13555; AOB 152-153.) Instead, respondent claims the evidence was admissible under factor (c) to prove appellant's conviction for the assault on Morton, and under factor (b) as a circumstance of the crime against Morton that occurred nine days earlier. (RB 102-103.)

1. The Statements Were Not Admissible to Prove That Appellant Had Been Convicted of a Crime of Violence Within the Meaning of Factor (c)

Appellant's alleged statements to Erickson on December 16, 1971, had no relevance to the question of whether appellant was subsequently convicted of the attempted murder of Florence Morton in April, 1972. Respondent appears to believe that the facts underlying the assault on Morton were admissible to prove that appellant had been *convicted* of that crime. (RB 103.) Respondent is incorrect. A prior conviction for a violent felony can be used as evidence that the defendant committed a crime of violence under factor (b). (*People v. Hinton* (2006) 37 Cal.4th 839, 910; *People v. Bradford* (1997) 15 Cal.4th 1229, 1374.) But it does not follow

that the circumstances of a violent crime can be admitted to show a defendant was subsequently convicted of that crime. The essential fact under factor (c) is the fact of conviction, not the truth of the underlying act. In short, while evidence of a conviction can be evidence that the act underlying the conviction occurred, evidence that the act occurred is not evidence that there was subsequently a conviction. Under factor (c), only the fact of the conviction is admissible, not the underlying facts of the crime. (*People v. Livaditis* (1992) 2 Cal. 4th 759, 776; see *People v. Gates* (1987) 43 Cal.3d 1168, 1203.) The statements were not admissible as factor (c) evidence.

2. The Statements Were Not Admissible as Factor (b) Evidence

Respondent claims that appellant's statements were a circumstance of the crime against Morton, despite the fact they were made nine days afterwards. Respondent believes that the statement was a "related circumstance" that provided "context" to the crimes against Morton. (RB 102.) This argument is no more availing than respondent's contention that the Morton crime and the Erickson incident should be seen as part of the same course of conduct for purposes of determining whether the notice was adequate.

Respondent also makes essentially the same argument here as in Argument 6, claiming that a statement made long after the commission of a crime can be a circumstance of that crime. Appellant's response is also the same: as discussed in Argument 6, section A., above, the evidence of a factor (b) violent crime may include "any pertinent circumstance" of the criminal activity (*People v. Ashmus*, *supra*, 54 Cal.3d at p. 985) or its " surrounding circumstances" (*People v. Kipp*, *supra*, 26 Cal.4th at p.

1134). But nothing in these cases or *People v. Wallace*, *supra*, 44 Cal.4th at p. 108, which respondent reprises for support, suggest that a statement made to the police nine days later is an actual circumstance of the crime.

Respondent argues that appellant's "coming on" statement was admissible "evidence of appellant's attitude toward his crime and the victim" which "reflected both on his undeterred criminality as well as his propensity to commit violent crimes." (RB 103.) First, respondent reads far to much into the alleged statement; it says nothing substantial about appellant's attitude toward his crime and victim. Furthermore, as discussed in appellant's opening brief, the evidence that is admissible to show appellant's propensity to commit violent crimes, is evidence of violent crimes. (AOB 154; see *People v. Balderas*, *supra*, 41 Cal.3d at p. 202.) Respondent is essentially trying to bootstrap a statement which could be interpreted as showing bad character into aggravating evidence by claiming it is a circumstance of a past crime. Similarly, respondent contends that the statement reflects appellant's undeterred criminality. Evidence of undeterred criminality is the theoretical underpinning for allowing evidence of prior convictions as aggravating evidence under factor (c). (*Ibid.*) But only the fact of the conviction is admissible evidence to prove a conviction under factor (c). (*People v. Livaditis*, *supra*, 2 Cal.4th at p. 759.) Therefore, the alleged statement was not admissible as factor (b) evidence.

C. The Errors Were Prejudicial

Respondent believes that any error was not prejudicial because evidence of the statement could have been introduced as rebuttal evidence. (RB 103-104.) Respondent's claim is both speculative and dubious. Rebuttal evidence is relevant and admissible if it tends to disprove a fact of consequence on which the defendant has introduced evidence. (*People v.*

Loker (2008) 44 Cal.4th 691, 709.) Respondent argues that the "coming on" statement, was an attempt to shift the blame to Morton, and that this in turn "suggested that his violent act was a result of a defect in his personality, rather than the result of mental confusion caused by an untreated brain injury or schizophrenia." (RB 104.) But appellant did not offer any kind of specific mental health defense to the Morton crime, so it is unclear what fact of consequence as to the Morton incident the evidence would be rebutting. Furthermore, appellant submits that when an suspect or arrestee makes a statement to the police that can be understood as partially or wholly exculpatory, that statement has little probative value as evidence that could help a jury discern whether the suspect is sociopathic, schizophrenic and/or suffering from brain damage.

Appellant did introduce evidence that appellant was diagnosed with paranoid schizophrenia as early as 1974 and that he suffered from long-standing organic brain damage. But the statement in question was made in 1971, eight years before the capital crime. Respondent's use of the statement had more to do with providing anecdotal evidence supporting his theory that appellant was a sociopath rather than rebutting the defense case.

Respondent believes the statement "reflected both on [appellant's] undeterred criminality as well as his propensity to commit violent crimes." (RB 103.) As shown above, the evidence should not have been admitted, and did not support the inferences respondent has attempted to draw from it. Nevertheless, the jurors could have come to view the evidence in the manner urged by the prosecutor. The prosecutor emphasized this statement in his closing argument to the jury as he sought to persuade jurors that appellant was a remorseless sociopath. This was a close case. The first penalty retrial resulted in a hung jury and the jury in this retrial deliberated

over the course of five court days. There is a reasonable possibility (see *People v. Brown*, *supra*, 46 Cal.3d at pp. 446-448) that the jury would have reached a verdict more favorable to appellant if it had not heard that appellant claimed Morton made sexual advances toward him. Similarly, the prosecution cannot establish beyond a reasonable doubt that the error was not prejudicial. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) For these reasons and those in the opening brief, the sentence and judgment of death must be reversed.

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8

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY INSTRUCTING THE JURY THAT IT COULD CONSIDER APPELLANT'S CONVICTION FOR ASSAULTING VERNA LYNETTE OLSEN UNDER SECTION 190.3, FACTOR (C)

Appellant showed in his opening brief that the trial court erred in instructing the jury that it could consider appellant's conviction for assault with a deadly weapon on Verna Lynette Olsen as a factor in aggravation under section 190.3, factor (c) (hereafter, factor (c)). (AOB 157-162.) A conviction under factor (c) can only be considered as aggravation if the date of conviction is prior to the commission of the capital crime for which the defendant is being tried. (*People v. Balderas* (1985) 41 Cal.3d 144, 201-202; *People v. Kaurish* (1990) 52 Cal.3d 648, 701-702.) Here the Olsen incident was alleged to have occurred on December 2, 1978, but the date of conviction was in August, 1979. The capital crime was committed on or about July 25, 1979. Therefore, the conviction on the Olsen assault was not a "prior" conviction and should not have been included in the instructions as aggravating evidence under factor (c).

Respondent concedes that the trial court erred but claims (1) appellant abandoned and forfeited his objection to the instructional error and (2) suffered no prejudice from the error. (RB 105, 109-110.)

A. The Error Was Not Abandoned or Forfeited

Appellant properly made his objection and preserved it by obtaining a ruling from the court on September 8, 1992, when the parties reviewed proposed jury instructions. (45 RT 14475 et seq.) A version of CALJIC No. 8.86 proposed by the prosecutor listed four felony convictions, including the Olsen assault, that the jury would be allowed to consider as

aggravating evidence under factor (c), including the Olsen assault conviction. (6 CT 1245-1246.) Appellant, in the following colloquy, objected to the inclusion of the Olsen conviction because it was not a prior conviction within the meaning of factor (c):

> MR. MASUDA [defense counsel]: The only thing we'd like to say is put an objection on the record with respect to the assault with a deadly weapon on Verna Lynette Olsen on December. It says on December 2nd, 1978, but the actual conviction, I believe, was on August 2nd, 1979, and at 190.3, sub (c), specifically, speaks of the presence or absence of any prior, and I emphasize "prior felony conviction" and this is not a prior felony conviction as to the offense of the murder.

(45 RT 14520.) After discussing the language of factor (c), the court responded:

> THE COURT: Okay. Well, I don't know. I think there is case authority that said it can be post the triggering crime, but, it would be prior to the trial.
>
> MR. MULLINS: Yes. That's my memory. I don't have those cases right at my fingertips.
>
> THE COURT: I am pretty sure. So, I am satisfied that "prior" does not mean that sequentially in time the act causing that crime or even the conviction has to have preceded the act that [sic] of homicide that is the basis of the penalty trial, so, I note your objection, but yeah, you're going to correct the date on it, by the way.

(45 RT 14520-14521.)

Thus, while noting appellant's objection, the court overruled it based on the court's erroneous belief that a conviction entered after a capital murder is admissible under factor (c) so long as the underlying crime was committed prior to the capital murder. Appellant did not need to do anything further to preserve the issue for appeal. Nevertheless, the court

reiterated its ruling shortly thereafter during a brief discussion of whether CALJIC No. 8.86 should state the date of the crime or the date of conviction when describing appellant's convictions, with the court deciding that either date would suffice. (45 RT 14521.) The court then concluded, "So, to the extent there is an objection to introducing or permitting number four, the assault with a deadly weapon on Verna Lynette Olsen, I would overrule that objection." (45 RT 14521.) The objection was clearly made and preserved for appeal.

Respondent claims, however, that appellant "abandoned his objection" by "failing to object to the court's deletion of the word 'prior' from the pattern instruction" and, when reviewing the modified instructions, "explicitly stated that it did not object to the modified instructions." (RB 109.) Respondent relies on the general proposition that a party who fails to secure a ruling on an objection forfeits the claim on appeal. (RB 109.) But in the cases respondent cites, *People v. Rowland* (1992) 4 Cal.4th 238, 259 and *People v. Jacobs* (1987) 195 Cal.App.3d 1636, 1650, the trial courts made no ruling on which an appeal could be based. As shown above, appellant made his objection, the prosecutor opposed it, and the court erroneously overruled it after considering its merits. Appellant secured a ruling by the court and did not forfeit the issue.

The court's modifications of CALJIC No. 8.86 were consistent with its ruling that appellant's conviction on the Olsen crime did not need to have preceded the commission of the capital crime to be considered as aggravation under factor (c). Therefore, having had his objection overruled, appellant had no basis for further objection. Appellant did not need to make a futile objection in order to preserve an issue. (*People v. Gamage* (2010) 48 Cal.4th 347, 373; *People v. Boyer* (1989) 48 Cal.3d 247, 270, fn.

13 [renewed objection would have been futile].) The law does not require idle acts. (Civ. Code, § 3532.)

Finally, the question of forfeiture or abandonment of the issue is irrelevant in light of section 1259 which allows an appellate court to review any instruction given, refused or modified, even if no objection was made in the lower court, where the substantial rights of appellant are affected. (*People v. Coffman* (2004) 34 Cal.4th 1, 103 fn. 34; *People v. Brown* (2003) 31 Cal.4th 518, 539, fn. 7.) The instruction affected appellant's substantial rights and the issue was therefore preserved for this appeal.

B. The Error Was Prejudicial

Respondent's claim that the error was harmless is equally misguided. In the opening brief, appellant acknowledged that in other cases in which a conviction had been entered after the capital crime was committed, this Court has found the error harmless where the facts underlying the conviction were properly considered as evidence of a prior violent act under section 190.3, factor (b) (hereafter, factor (b)). (AOB 160.) The Court has reasoned that where the facts of the crime are disclosed under factor (b) the additional fact of conviction adds little to the total picture considered by the jury. (See, e.g., *People v. Kelly* (1992) 1 Cal. 4th 495, 550.) In the present case, however, the prosecutor did not elect to use any of the crimes for which appellant had been convicted as evidence of prior violent acts under factor (b), and the court specifically instructed the jurors that they could not consider evidence of any other violent acts as aggravation under factor (b) other than those listed. The assault on Olsen was not listed.

Respondent recognizes that the trial court instructed the jury that the only crimes it could consider under factor (b) were the three crimes alleged in the Siroky incident and the alleged attempt to dissuade Morton from

testifying against appellant. (RB 113.) The instruction given was a slightly modified version of CALJIC No. 8.87. After listing these four specific acts of criminal violence or threatened violence, the court informed the jury as follows: "*You may not consider any evidence or any other criminal acts as an aggravating circumstance pursuant to factor (b).*"[6] (47 RT 15186, emphasis added.) The instruction makes clear that the jury's consideration of other crimes under factor (b) was limited to the four listed offenses. Furthermore, the list of criminal acts and the language limiting the jury's consideration of factor (b) evidence to those four acts was offered by the prosecutor in his proposed instructions. (6 CT 1247-1248.)

Respondent insists, however, that this instruction did not prevent jurors from properly considering other crimes under factor (b), and specifically those crimes underlying appellant's prior convictions introduced under factor (c). (RB 113.) According to respondent, CALJIC No. 8.88 permits the jury to consider evidence of any violent criminal activity despite the court's specific instruction limiting such evidence to the four listed offenses against Siroky and Morton. (RB 113.) Respondent claims that CALJIC No. 8.88 did not conflict with that instruction – a tailored version of CALJIC No. 8.86 – because the jurors could understand it to allow them to consider other violent crimes evidence "regardless of whether it was factor (b) or (c)." (RB 113.) Given that evidence of other crimes is not relevant to any other factors under section 190.3, respondent seems to be proposing that the instructions allowed the jurors to consider the Olsen crime as a non-statutory aggravator. This, of course, would violate the well-established rule of *People v. Boyd* (1985) 38 Cal.3d 762,

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[6] The complete instruction as given is set out in appellant's opening brief at page 157, footnote 30. (See also 47 RT 15185-15186.)

774, which holds that the prosecution's case for death is limited to evidence based on the statutory factors listed in section 190.3.

Respondent's theory would also run afoul of this Court's advice on other crimes evidence under section 190.3 in *People v. Robertson* (1982) 33 Cal.3d 21, 55, fn. 19, which is reflected in CALJIC No. 8.87:

> In order to avoid potential confusion over which "other crimes" – if any – the prosecution is relying on as aggravating circumstances in a given case, the prosecution should request an instruction enumerating the particular other crimes which the jury may consider as aggravating circumstances in determining penalty. The reasonable doubt instruction . . . can then be directly addressed to these designated other crimes, and the jury should be instructed not to consider any additional other crimes in fixing the penalty. Without such a limiting instruction, there is no assurance that the jury will confine its consideration of other crimes to the crimes that the prosecution had in mind . . . .

(*Ibid.* [interpreting 1977 death penalty law].) Section 190.3 does not permit other crimes evidence to be considered in aggravation other than in the framework of the listed factors, and the Olsen crime was excluded from consideration under factor (b).

Appellant did not object to the admission of evidence of the acts of violence underlying the factor (c) convictions, and respondent mistakenly finds this significant. (See RB 111.) Appellant had no basis to object to evidence of the facts underlying the Olsen incident when it was presented. While the prosecution is precluded at the penalty phase from offering evidence in aggravation unless properly noticed (§ 190.3, ¶ 4), here the prosecutor gave notice as to each of the incidents to which the factors (b) and (c) evidence related. (4 CT 987-999.) This Court has held that notice pursuant to section 190.3 that the prosecution will present evidence relating to a prior crime or conviction is sufficient to inform the defense that

evidence of uncharged other crimes committed as part of the same incident may be offered. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1029; see *People v. Farnam* (2002) 28 Cal.4th 107, 175.) Therefore, the prosecutor could have requested that the court include the crimes underlying the convictions in the list of factor (b) offenses. He elected not to do so, but was not committed to that election until the jury instructions had been decided upon. Accordingly, when the evidence of the Olsen assault was introduced, appellant had no basis to object.

Respondent next takes the position that the failure to include the Olsen assault, as well as the other violent crimes underlying the convictions admitted under factor (c), in the list of factor (b) crimes was somehow an instructional error. (See, e.g., RB 113, 115.) Perhaps cognizant of the fact that a *respondent's* claim of instructional error is not by itself a basis to defeat a defendant's appeal, respondent seeks to blame appellant for failing to correct this error. (RB 113-115.) Respondent's various points on this theme are misguided.

First, the version of CALJIC No. 8.87 given was not incorrect. The prosecutor chose to try his case using four unadjudicated incidents of violence as factor (b) evidence and four convictions as factor (c) evidence, and the court gave instructions consistent with that decision. The trial court did not have to instruct on the crimes underlying the conviction where the prosecutor did not intend to use those as part of his penalty phase case. As set out in the above-quotation from *People v. Robertson*, *supra*, 33 Cal.3d 21, 55, fn. 19, this Court has recommended that trial courts enumerate the other crimes offered to prove factor (b) aggravation because if it does not do so the jury may not "confine its consideration of other crimes to the crimes that the prosecution had in mind. . . ." It is therefore implicit that if

the prosecution has in mind to limit the jury's consideration of factor (b) evidence, it can do so. That is what the prosecutor did here.

In the first penalty retrial, which immediately preceded this retrial and resulted in a mistrial, the prosecution limited its factor (b) case in a similar manner. The prosecutor in that retrial – a different prosecutor, from the same office – designated the three crimes against Mary Siroky and the assault on Steve Laughlin as the only factor (b) offenses and the Morton assault, Scott battery, escape from custody in San Bernardino, and the assault on Olsen as the only factor (c) crimes.[7] (29 RT 9970-9972.) The jurors were also specifically instructed that they were not to consider any evidence of any other criminal acts as an aggravating circumstance under factor (b). (29 RT 9972.) In light of the prosecution's presentation of its case in the first retrial, there is no basis to assume the prosecution wanted the crimes underlying the factor (c) convictions to be considered under factor (b) in this trial.

Because CALJIC No. 8.87 was not incorrect, and appellant has not alleged an error as to the instruction on factor (b), respondent's reliance on *People v. Lewis* (2001) 25 Cal.4th 610 and *People v. Bacon* (2010) 50 Cal.4th 1082, is misplaced. In *People v. Lewis*, *supra*, 25 Cal.4th at pp. 664-668, the trial court listed factor (b) crimes in its CALJIC No. 8.87

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[7] The first retrial also provides insight into the erroneous use of the Olsen assault as a "prior" conviction. The court in that retrial correctly instructed the jury that to be considered as evidence in aggravation under factor (c), a conviction had to have been entered prior to the date of the Cavallo murder on July 24 or 25, 1979. (29 RT 9965.) However, the jury was instructed that it *could* consider the Olsen conviction under factor (c), apparently because it was erroneously identified as having been entered on December 2, 1978, which was the date of the crime, rather than August 2, which was the date of conviction.

instruction, but inadvertently omitted one. There is no indication in the opinion that the version of CALJIC No. 8.87 as given admonished the jurors that the listed other crimes were the only ones they could consider in aggravation. Defendant in *Lewis* complained that, as to the omitted crime, he did not get the benefit of having the jury specifically informed that the beyond-a-reasonable-doubt standard applied, as it was as to the crimes listed. This Court noted that because there is no requirement that all factor (b) crimes be specified in the instruction, the instruction was not incorrect, and that it was incumbent on the defense to request a more complete instruction if it wanted one. (*Id.* at p. 666.) In *People v. Bacon*, *supra*, 50 Cal.4th at pp. 1119-1124 the court's instruction under CALJIC No. 8.87 made specific reference to one uncharged factor (b) crime – possession of a firearm while on parole – but did not so reference a prior murder which was also to be considered under factor (c). Defendant complained that the failure to list the applicable crimes meant that the jury might not have applied the beyond-a-reasonable-doubt standard. Relying on *People v. Lewis*, *supra*, 25 Cal.4th at p. 610.) This Court held that there was no obligation on the part of the trial court to specify for the jury what criminal activity it could consider. (*Id.* at p. 1123.) *Lewis* and *Bacon* are inapplicable to appellant's case. Appellant is not claiming CALJIC No. 8.87 as given in his case was erroneous. In fact, he contends it was correct, and that its clear language, proposed by the prosecution, limited the jury's consideration of factor (b) crimes to those specified. Nothing in either *Lewis* or *Bacon* indicates that such a limitation was given in the relevant instructions in those cases.

Rather than wrongly *excluding* a crime from the factor (b) instruction, the court in appellant's case wrongly *included* the Olsen assault

crimes the jury could consider under factor (b) did not include the Olsen assault, the jury did not, and could not have, considered the fact of that assault as an aggravating factor.

Respondent also seeks to excuse the error in permitting the Olsen conviction to be used as factor (c) evidence by trying to make appellant complicit in the court's error. Respondent argues that "the prosecutor agreed with defense counsel that factor (b) evidence was limited to unadjudicated felony criminal acts of violence or threatened violence." (RB 106.) The 33 pages of reporter's transcript respondent cites do not support respondent's claim of such an agreement or the underlying assumption that defense counsel believed that factor (b) evidence was limited in this manner.

Respondent also claims that had the jury been instructed on the factor (c) crimes under factor (b), appellant would not have been entitled to an instruction that the factor (b) crimes had to be proved beyond a reasonable doubt. (RB 115.) While it is unclear to appellant how this point might relate to the issue at hand, it is very clear that the point is simply incorrect. For factor (b) crimes, the criminal act must be proven beyond a reasonable doubt. (*People v. Davenport* (1985) 41 Cal.3d 247, 280-281; *People v. Robertson, supra*, 33 Cal.3d 21, 53.) For factor (c) convictions, the fact of conviction must be proven beyond a reasonable doubt. *(People v. Williams* (2010) 49 Cal.4th 405, 459; *People v. Millwee* (1998) 18 Cal.4th 96, 161, fn. 30.) The fact of conviction, in turn, can be used as evidence to prove the act in a factor (b) crime (*People v. Ray* (1996) 13 Cal.4th 313, 318; *People v. Hayes, supra*, 52 Cal.3d at pp. 632-633 [re juvenile adjudications]), but evidence of a conviction does not obviate the requirement that the act be proved beyond a reasonable doubt, and that the

jury be informed of that requirement.

Respondent claims that the admission of the Olsen conviction was not prejudicial in light of the other aggravating evidence under factors (b) and (c). (RB 110.) The only factor (b) evidence presented by the prosecutor was the three crimes committed against Mary Siroky in one incident, and a telephonic threat to Florence Morton. The factor (c) convictions, other than the Olsen conviction, were the assault with intent to commit murder against Morton and two in-prison crimes – an assault against another inmate while appellant was in prison in Vacaville, and a forcible prison escape from state prison in Chino. Therefore, the Olsen incident was a significant piece of aggravating evidence for the prosecution. Had the jury not considered the evidence of the conviction or the underlying facts of the incident, there is a reasonable possibility that the jury would have returned a more favorable verdict. (*People v. Brown*, *supra*, 46 Cal.3d at pp. 444-446.) Furthermore, respondent has not shown beyond a reasonable doubt that the error was harmless. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) The sentence and judgment of death must therefore be reversed.

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THE COURT'S LOSS OF DEFENDANT'S EXHIBIT N DEPRIVED APPELLANT OF DUE PROCESS AND A FAIR PENALTY TRIAL

Appellant moved for a new trial under section 1118.5. (6 CT 1333-1336.) The motion was based on the unusual circumstance of the trial court unwittingly losing an important trial exhibit, Defendant's Exhibit N (Exhibit N), and failing to discover the loss until after the jury had returned its death verdict. Exhibit N was a letter supporting the defense theory that appellant suffered from significant mental illness from an early age and that the Michigan juvenile justice system failed him when he had been a ward of the court in the 1960's. (AOB 161-173.) The error was compounded when the court told the jury that it was sending into the jury room all the exhibits that had been admitted; because Exhibit N obviously was not among the exhibits sent into the jury room, the jury would have assumed it was not in evidence and therefore could not be considered as mitigating evidence. At the hearing on the motion for new trial, the trial court acknowledged the loss of Exhibit N but concluded that appellant was not prejudiced by the error. (48 RT 15401.) Respondent acknowledges that Exhibit N was lost, but claims the court did not abuse its discretion in denying appellant's new trial motion. (RB 117-121.)

Respondent attempts to undercut the significance of the error with two points. First, respondent contends that neither party may require the jury to view or consider trial exhibits during deliberations. (RB 119.) But while the *parties* may not require jurors to consider the evidence, the *court* can and must instruct the jury to consider all the evidence received. Section 190.3 states that, "After having heard and received all of the evidence, and

after having heard and considered the arguments of counsel, the trier of fact *shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section. . . .*" (§ 190.3, emphasis added.) The jury here was correctly given the standard instruction: "In determining which penalty is to be imposed, *you shall consider all the evidence which has been received* during any part of the trial of this case." (47 RT 15177, *emphasis* added; see also CALJIC No. 8.85.) The jury was therefore required by both statute and instruction to consider appellant's mitigation evidence, including Defendant's Exhibit N.

Second, respondent suggests that the court did not send all the admitted exhibits into the jury room. (RB 120, fn. 30.) This is incorrect. On September 15, the court told the jury that it had reviewed all the evidence, and that

> virtually all the exhibits that were talked about and presented to you have been introduced into evidence. [¶] There are a couple, that for various reasons, I chose not to submit to you. I doubt that they will be probably anything that you are seeking, so I don't think I will attempt to go through and explain. [¶] You should not concern yourself as to why the Court might exclude a specific exhibit.

(47 RT 15202-15203.)

On September 16, after closing arguments, the court gave the jury its final instructions, just before the jury would be sworn and deliberations started. Among those instructions, the court told the jury,

> The exhibits will be shortly brought to you, so you will have access to them, and the bailiff will be in charge of that.

(48 RT 15345.)[8]

Thus, the court clearly informed the jurors on September 15 that "virtually all" of the exhibits marked during the trial were admitted into evidence; that there were "only a couple" that it "chose not to submit" to the jurors; and that the jurors should not concern themselves with why the court might "exclude a specific exhibit." (47 RT 15202-15203.) Read together with the instruction on September 16, it is clear that the exhibits being sent into the jury room were the admitted exhibits, and that the exhibits not admitted were not sent in. Respondent seems to believe that when the court said it chose not to "submit" certain exhibits to the jury, it meant it was choosing not to send into the jury room select exhibits that had been admitted. Whatever ambiguity might be read into the use of the word "submit" disappears, however, when read in context with the language which follows. The court tells the jury that as to those exhibits which were not submitted, "I doubt that they will be probably anything that you are seeking, so I don't think I will attempt to go through and explain." (47 RT 15202.) If the court were discussing exhibits it had admitted, this would clearly be an inappropriate comment on the evidence, essentially telling the jurors that there was admitted evidence in which they probably would have no interest. That interpretation makes no sense; the clear meaning of the court's statement is that the only exhibits it was not sending into the jury room were those which had *not* been admitted. Rather than support respondent's position, this portion of the record simply accentuates the

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[8] Respondent states that appellant made, without citation, the assertion that the jury was told that all the exhibits would be transferred to the jury room. (RB 120, fn. 30.) The citation (to 48 RT 15345) is on page 167 of appellant's opening brief.

point that the jury, without Exhibit N in the jury room, would assume it was not admitted and could not be considered.

Respondent's main contention is that the trial court did not abuse its discretion in determining that there was no prejudice to appellant. (RB 120-121.) Appellant disagrees. The court gave three reasons for finding no prejudice: First, it stated, "I do recall that much of the information that was of a sympathetic nature to the defendant concerning this youthful period was presented through the testimony of these two witnesses, Dr. Komisourak [sic] and Mr. Peterson; and as counsel [i.e., the prosecutor] has pointed out, much of the substantial portion of the letter was read into the record." (48 RT 15401.) Second, the court stated that "there's no indication that the jurors requested the letter, noted its absence or felt they needed some additional information from that letter." (48 RT 15401.) Third, the court believed "that the substance and information and significance of that letter and significance of that information was communicated to the jurors through the testimony of those two witnesses who did, I think, fully testify and present their views to the jury." (48 RT 15401.)

None of the court's reasons for finding no prejudice withstand scrutiny. As to the court's first reason, the assumption that a substantial portion of the letter had been read into the record was simply incorrect. In his opening brief, appellant pointed out that the portion of the letter which was read into the record was done so by the prosecutor on cross-examination, and only included statements which supported the prosecutor's theory that appellant had an antisocial personality disorder. (AOB 169.) The court's second reason provides an equally clear indication of the court's abuse of discretion. The court found significance in the fact

that the jury did not ask for the letter or seek additional information from it. But the jury had no basis on which to request the letter because the court told the jury that it was sending into the jury room all the exhibits except those that the court had excluded. (47 RT 15202-15203; 48 RT 15345.) From the failure of the jury to ask for the letter or more information about it, the court appears to have inferred that the letter was of no significance to the jurors, or that they were fully aware of its contents. Respondent suggests that the jury's failure to request a view of the letter implied it did not notice the letter's absence. (RB 120.) None of these inferences is reasonable, however, in light of the court's instructions. Instead, the reasonable inference to be drawn is that the jury understood that it was not to consider or rely on the letter.

The court also erred in believing that the testimony of Peterson and Komisaruk provided the substance of the information contained in Exhibit N. The two witnesses provided information about the juvenile court system in Michigan generally, but the letter was important in linking the problems in that system to appellant, and showing how he was affected by those problems.

Respondent argues that the court's ruling was supported by substantial evidence, and seems to be claiming that this was because appellant was able to argue his case in mitigation without the letter. (RB 121.) Of course counsel argued appellant's mitigation case to the jury in a manner consistent with Exhibit N having been available to the jury, because he knew the exhibit had been admitted and was unaware it had been lost. The question is not whether counsel was able to argue his mitigation case to the jury, but whether the jury was less likely to accept and believe the mitigation case because a key piece of evidence supporting it was missing.

As discussed in appellant's opening brief, the trial court acknowledged that the letter was important to the defense for three reasons: it was a substantial piece of mitigation on it own, it corroborated the testimony of Kenneth Peterson, and supported the testimony of Komisaruk. (48 RT 15397; see AOB 168.) The letter was a solid piece of contemporaneous evidence supporting appellant's claims and lending credibility to his witnesses who were testifying to events that occurred decades earlier and who had little or no independent recollection of appellant personally. The prosecution did not establish beyond a reasonable doubt that the error was harmless. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Furthermore, there is a reasonable possibility that the jury would have returned a verdict more favorable to appellant but for the error. (See *People v. Brown*, *supra*, 46 Cal.3d 446-449.)

The trial court abused its discretion in denying appellant's motion for a new trial based on the loss of Exhibit N. The death sentence and judgment must therefore be reversed.

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10

THE CUMULATIVE EFFECT OF ALL THE ERRORS REQUIRES REVERSAL OF THE DEATH JUDGMENT

Appellant has argued that the cumulative effect of the errors at trial require reversal of the sentence and judgment of death even if any single error considered alone would not. (AOB 172-177.) Respondent simply contends no errors occurred, and that any errors which may have occurred were harmless. (RB 121-122.) The issue is therefore joined. Should this Court find errors which it deems non-prejudicial when considered individually, it should reverse based on the cumulative effect of the errors. No further reply to respondent's argument is necessary.

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11

CALIFORNIA'S DEATH PENALTY STATUTE VIOLATES THE FEDERAL CONSTITUTION

Appellant argued in his opening brief that, for multiple reasons, California's capital sentencing scheme violates the United States Constitution. (AOB 178-193.) Appellant recognizes that this Court has previously rejected these arguments, but urges the Court to reconsider them. Respondent relies on the Court's previous precedents without substantive new arguments. (RB 122-128.) Accordingly, no reply is necessary to respondent's argument, with the one following exception.

In Section B. 7, appellant argued that the failure to inform the jury regarding the standard of proof and lack of need for unanimity as to mitigating circumstances violated the Sixth, Eighth and Fourteenth Amendments to the federal Constitution. (AOB 188-189.) Respondent claims appellant has failed to cite to the instruction about which he is complaining. (RB 126, fn.33.) Appellant's argument is that there is an absence of an instruction setting forth the appropriate burdens and that the instructions as a whole would lead the jury to believe appellant bore some particular burden in proving facts in mitigation.

Appellant also argued that in the absence of an explicit instruction to the contrary, there was a substantial likelihood that jurors believed unanimity was required for finding the existence of mitigating factors. (AOB 189.) In support of this argument, appellant noted that jurors could be misled by the instructions requiring unanimity as to the guilt and special circumstance allegations. (AOB 189.) Respondent correctly points out that such instructions were not given to the jury here because this was a penalty phase retrial. (RB 126, fn. 33.) Appellant's argument stands, however,

regardless of the loss of that particular supporting point because the court's failure to provide the jury with appropriate guidance was error.

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12

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS

Appellant argued in his opening brief that California's failure to provide intercase proportionality review in capital cases violates the Eighth and Fourteenth Amendments, while acknowledging that this Court has frequently rejected similar arguments. (AOB 194-202.) Respondent summarily relies on this Court's prior decisions rejecting such arguments. Accordingly, the issue is joined and no reply is necessary.

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13

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW

In his opening brief, appellant argued California's sentencing procedures violate international law, fundamental precepts of international human rights and the Eighth Amendment to the extent that international legal norms are incorporated into a determination of evolving standards of decency. (AOB 203-205.) Appellant requested that this Court reconsider its decisions rejecting similar claims (see e.g., *People v. Hillhouse* (2002) 27 Cal.4th 469, 511). Respondent relies on this Court's prior decisions without further analysis. Accordingly, no reply is necessary to respondent's argument.

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14

THE TRIAL COURT ERRED IN DENYING APPELLANT'S AUTOMATIC MOTION TO MODIFY THE JUDGMENT BY RELYING ON FACTS UNAVAILABLE TO THE JURY

In his opening brief, appellant argued that the case must be remanded to the trial court for a new hearing on the automatic motion to modify the judgment under section 190.4, subdivision (e). (AOB 206-211.) The well-established rule is that the trial court, in ruling on the motion to modify, makes an independent determination whether the death penalty is proper in light of the relevant evidence and applicable law. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 793.) At issue here is the corollary to that rule, which is that the trial court is limited to consideration of the evidence that was before the penalty jury. (See *People v. Viscotti* (1992) 2 Cal.4th 1, 78.)

A. The Trial Court Relied on Facts Unavailable to the Jury

The trial court here considered four pieces of aggravating information that were either not before the penalty jury because they had not been introduced into evidence, or were in evidence but could not have been considered by the jury as evidence in aggravation in the way the court did. First, it considered two matters which had not been admitted: (1) evidence that appellant had raped Florence Morton, and (2) a letter written by appellant to the trial court handling the charges against him from the Lynette Olsen incident. Respondent recognizes that the court's review in the automatic motion to modify is limited to the evidence that has been admitted and before the jury and also concedes that the court considered the Morton rape and the letter regarding the Olsen case. (RB 130-131.) As to these two matters, there is no question that error occurred.

Respondent does not agree that the two other matters were improperly considered by the court. In his opening brief appellant argued that the court considered the underlying facts of the two separate assaults on Florence Morton and Lynette Olsen as evidence of appellant's character for violence, as if they had been introduced as acts of prior violence under section 190.3, factor (b). As discussed more fully in Argument 8, *ante*, the jury was instructed that they could consider these crimes only as prior convictions under section 190.3, factor (c).

Factors (b) and (c) have distinct purposes. Factor (b) evidence is relevant to the penalty determination because it tends to prove a defendant's propensity for violence. (*People v. Balderas* (1985) 41 Cal.3d 144, 203.) Evidence of prior convictions under factor (c), on the other hand, is relevant to the penalty determination because it tends to show a defendant's habitual criminality that was undeterred by society's prior criminal sanctions. (*Ibid.*) In discussing its reasons for refusing to modify the judgment of death, the court made it clear that it was considering the Morton and Olsen assaults as evidence of appellant's propensity for violence. It noted that aggravating factors are the gross violence that has attended his crimes, the assault on Florence Morton, the rape and the assault with intent to commit murder on Florence Morton was an outrageous crime." (48 RT 15411.) The court went on to describe details of the attack on Morton. (48 RT 15411-15412.) Turning to Olsen, the court characterized it as an "extremely violent knife attack. . . ." (48 RT 15412.) He then went on to describe further facts about that crime. (48 RT 15412.) The focus of these remarks was on the violence perpetrated on these women, not on appellant's convictions. While the evidence the court relied on was before the jurors, they could not have used it to assess appellant's character for violence under factor (b) because they

were instructed that the only crimes they could consider under factor (b) did not include the Morton and Olsen assaults. (47 RT 15184-15185; 6 CT 1293-1294.) Accordingly, the trial court should not have considered the evidence in this way either, and to do so was error.

B. The Errors were Prejudicial

As a preliminary matter, respondent implies that this Court should apply a deferential standard of review in determining whether error occurred. (RB 129.) That is incorrect. Denial of an application for modification under section 190.4, subdivision (e) is subject to independent review because the decision resolves a mixed question of law and fact. (*People v. Carter* (2005) 36 Cal. 4th 1114, 1210-1212; *People v. Mickey, supra,* 54 Cal.3d 612, 703-704; *People v. Jones* (1997) 15 Cal.4th 119, 191.) The Court independently reviews the trial court's ruling after reviewing the record, but does not determine the penalty de novo. (*People v. Steele* (2002) 27 Cal.4th 1230, 1267; *People v. Clair* (1992) 2 Cal.4th 629, 689.)

Regardless of which standard of review is applicable, the error was prejudicial. Where the trial court relies on information that was not properly before it, this Court must determine whether the trial court may have been improperly influenced by that evidence. (*People v. Coddington* (2000) 23 Cal.4th 529, 645.) As set out in appellant's opening brief, the heart of the prosecutor's case for death was appellant's violent history. (AOB 210-211.) The trial court's denial of the motion was based on that same history. After recounting the facts of appellant's crimes, including those discussed above, it summed up, "So the violence is so extreme. And the continuity of that violence over a period of time is so extreme." (48 RT 15413.) Because the trial court specifically cited to facts which were not in

evidence in stating its reasons for denying the motion, it is clear that the court may have been influenced by the evidence it improperly considered. (See AOB, 210-211, citing *People v. Lewis* (1990) 50 Cal.3d 262, 287.)

Respondent claims that there is no reasonable possibility that the trial court would have reached a different conclusion absent its error. Respondent's support for this assertion is simply an accounting of appellant's criminal history. (RB 131-132.) But there is nothing about that history which particularly demands a death judgment, and the substantial mitigation case presented by appellant. Respondent's argument is more that the court *could* have denied appellant's motion despite its errors, and fails to address the fact that the court specifically relied on some of the improperly-considered information when explaining its reasons for denying the motion.

Appellant has described in his opening brief how the trial court's mistakes violated both state law and federal constitutional law. Under either the reasonable-possibility test for state law errors (*People v. Brown*, *supra*, 46 Cal.3d at pp. 446-449) or the beyond-a-reasonable-doubt standard for federal law errors (*Chapman v. California*, *supra*, 386 U.S. at p. 24) the error here requires a new hearing on the motion to modify the death verdict.

For the foregoing reasons, the judgment of death should be reversed and the case remanded to the trial court for a new hearing pursuant to section 190.4, subdivision (e).

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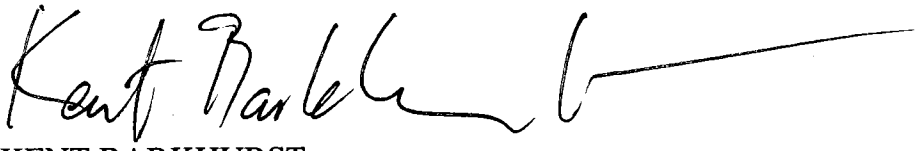
CONCLUSION

For the foregoing reasons, the sentence and judgment of death must be reversed.

DATED: May 28, 2014

Respectfully submitted,

MICHAEL HERSEK
State Public Defender



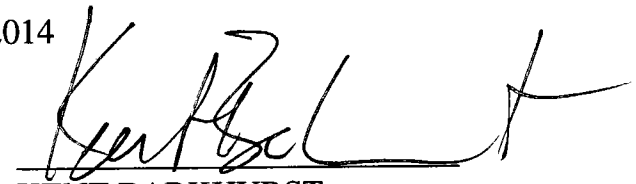
KENT BARKHURST
Supervising Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630(b)(1)(C))

I, Kent Barkhurst , am a Supervising Deputy State Public Defender, and am appellate counsel for JOE EDWARD JOHNSON in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 24,780 words in length.

DATED: May 28, 2014



KENT BARKHURST

DECLARATION OF SERVICE BY MAIL

Case Name: **People v. Joe Johnson**
Case Number: **Supreme Court Crim. No. S029551**
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Mr. Joe Edward Johnson
C-31602
North Seg. 16-South
San Quentin State Prison
San Quentin, CA 94974

Clerk of the Superior Court
for the delivery to the
Honorable Peter Mering
720 Ninth Street, Room 101
Sacramento, CA 95814

Habeas Corpus Resource Center
303 Second Street, #N400
San Francisco, CA 94107-1328

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 29, 2014, at Oakland, California.

NEVA WANDERSEE

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